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## Public Prosecutor v Gan Boon Aun

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 06–2–05 OF 2016
ARIFIN ZAKARIA CHIEF JUSTICE, AHMAD MAAROP, HASAN LAH, ABU SAMAH NORDIN AND JEFFREY TAN FCJJ
15 MARCH 2017

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*Constitutional Law — Legislation — Validity of impugned legislation — Whether s 122(1) of the Securities Industry Act 1983 violated right of accused to be presumed innocent until proven guilty and to have criminal charge against him proven by prosecution beyond all reasonable doubt — Whether s 122(1) infringed arts 5(1), 8(1) and 121 of the Federal Constitution — Whether s 122(1) violated doctrine of separation of powers by usurping power of judiciary to adjudicate upon an accused's guilt or innocence — Whether continued prosecution of accused on alternative charge after acquittal on principal charge breached art 7(2) of the Constitution and doctrine of autrefois acquit*

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Pursuant to ss 84(3) and (4) of the Courts of Judicature Act 1964 ('the CJA'), the High Court in the instant case had framed and referred to the Federal Court for its determination, inter alia, the question whether s 122(1) of the Securities Industry Act 1983 ('the SIA 1983') — since repealed by the Capital Markets and Services Act 2007 — violated arts 5(1) and 8(1) of the Federal Constitution in that it abrogated the right of an accused person to (a) be presumed innocent until proven guilty and (b) have a criminal charge against him/her proven by the prosecution beyond reasonable doubt. The apex court was also asked to determine whether s 122 (1) of the SIA 1983 violated art 121 of the Federal Constitution and the doctrine of separation of powers on the basis Parliament had usurped judicial power by deeming that a director, chief executive officer, an officer or a representative of a body corporate had committed the same offence that the body corporate had committed under the SIA 1983 or any regulation made thereunder. The High Court had also framed as a 'constitutional issue' the question whether the respondent's continued prosecution on an alternative charge under s 122B(a)(bb) read together with s 122(1) of the SIA 1983, after he had been acquitted of the principal charge under s 86(b) read together with s 122C(c) of the same Act, violated art 7(2) of the Federal Constitution ('the Constitution'). The respondent and another person, both directors of a company, were charged in the sessions court with the principal offence of abetting the company in making a misleading statement in the company's quarterly financial report which statement was likely to induce others to buy the company's securities. The alternative charge against them was that they had furnished the said misleading statement in the

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quarterly report to Bursa Malaysia with intent to deceive and that since they were directors of the company at the material time, they were deemed to have committed an offence under s 122B(a)(bb) read together with s 122(1) of the SIA 1983. At the close of the prosecution's case, both accused were acquitted of the principal charge but their defence was called to the alternative charge. Both accused objected, saying the alternative charge was unconstitutional and null and void because of the deeming provision in s 122(1). They successfully applied to the trial court to stay the proceedings and, pursuant to s 30 of the CJA, refer to the High Court for its determination the question whether s 122(1) of the SIA 1983 violated arts 5(1) and 8(1) of the Constitution. In turn, the High Court framed and referred the instant 'constitutional issues' for the Federal Court's determination. Section 122(1) of the SIA 1983 provided that where a body corporate had committed an offence under the SIA 1983 or any regulation thereunder, any person who at the time of the offence was a director, chief executive officer, an officer or a representative of the body corporate was deemed to have committed that offence unless he proved that the offence was committed without his consent or connivance and that he had exercised all such diligence to prevent its commission. The respondent submitted that s 122(1) did three things: (a) it deemed B guilty of an offence committed by A, thereby displacing B's presumption of innocence and dispensing with the rule that it was for the prosecution to prove guilt; (b) it placed the onus on B to prove the excusing factors to avoid punishment; and (c) it adjudicated upon B's guilt based on A's conduct and thus usurped the power of the courts to determine guilt or innocence, thus violating the doctrine of separation of powers.

**Held**, that s 122(1) of the SIA 1983 was not unconstitutional:

(1) Section 122(1) of the SIA 1983 did not violate the doctrine of presumption of innocence. It maintained the burden of proof, in that the prosecution had to prove a charge against an accused beyond all reasonable doubt and it upheld the doctrine of separation of powers (see para 61).

(2) There was no basis to hold that s 122(1) was unconstitutional. No attempt was made by either party to show how s 122(1) had or had not gone beyond the permissible limits or had or had not unjustifiably infringed the presumption of innocence. Since it was not shown to be otherwise, the presumption in favour of constitutionality was not rebutted. Presumptions and reverse onus clauses were not prohibited by art 5 of the Constitution. It was futile to contend that s 122(1) was unconstitutional because of the presumption and reverse onus clauses. Section 122(1) would be unconstitutional only if it lacked overall fairness. But the substance and effect of the presumption in s 122(1) was reasonable and was not greater than was necessary. The rights of the defence were maintained. The statutory defence provided the

opportunity to an accused to rebut the presumption and it was only right that an accused should prove the matters set out in the statutory defence. Fairly said, there was a balance between the general interest of the community and the protection of fundamental rights (see paras 47 & 52).

(3) The evident aim of the SIA was to regulate the industry, promote public confidence in the integrity of the stock market and punish violators with criminal and civil liability. It only made good sense that s 122(1) provided that directors and/or officers shall be deemed to have committed the offences committed by the corporate 'unless ...'. To achieve the aim of the SIA, the offence of the corporate had to be attributed, and rightly so, to its human operatives, namely its directors and/or officers. That presumption was not only fair but was also absolutely necessary to protect the stock market (see para 48).

(4) The presumption of innocence required the prosecution to prove the guilt of an accused beyond all reasonable doubt. Under s 122(1), the corporate offence had to be first proved before the presumption could be triggered against the directors and/or officers. Although the section provided that directors and/or officers of the corporate shall be deemed to have committed the corporate offence, there was no let-up in the burden or standard of proof. The prosecution had to prove the offence beyond all reasonable doubt before the deeming provision could be triggered. There was thus no displacement of the presumption of innocence (see para 49).

(5) There was no merit in the argument that s 122(1) deemed B guilty of an offence committed by A. Guilt was never deemed or presumed. Section 122(1) only deemed that B committed the offence committed by A because only B could have caused or motivated the offence committed by A 'unless ...'. The 'unless proviso' did not place the onus on B to prove the excusing factors to avoid punishment but gave B the opportunity to rebut the deeming provision by providing a statutory defence namely the absence of knowledge, consent or connivance of the directors or officers, which were matters clearly within the sole knowledge of the directors and/or officers. It was only fair that the matter of absence of knowledge, consent or connivance should be proved by the accused. It was a statutory defence and no prosecution had the onus to prove a defence, statutory or otherwise (see para 50).

(6) The contention that s 122(1) breached the doctrine of separation of powers in that it was adjudicatory, and not evidential, of the guilt of B, was bereft of merit. Section 122(1) was just an offence-creating provision and the adjudication of guilt or innocence was left to the court with freedom to decide. If s 122(1) had adjudicated on guilt, then the respondent would not have been tried but would have been sentenced the moment it was proved that the corporate had committed the offence. But

his defence was called. Section 122(1) gave the opportunity to the respondent to rebut the presumption that he had committed the offence committed by the corporate. Guilt or innocence had yet to be decided pending the defence of the respondent (see para 51).

(7) The question whether the continued prosecution of the respondent on the alternative charge after his acquittal on the principal charge had violated art 7(2) of the Constitution should not have been accepted by the courts below as a 'constitutional issue'. In substance, the issue was just a plea of *autrefois acquit* which applied only where an accused was charged for the same offence for which he had been acquitted. The ingredients of the principal and the alternative charges were different in fact and in law. A plea of *autrefois acquit* could not succeed (see paras 56 & 60).

**[Bahasa Malaysia summary**

Menurut ss 84(3) dan (4) Akta Mahkamah Kehakiman 1964 ('AMK'), Mahkamah Tinggi dalam kes ini telah merujuk kepada Mahkamah Persekutuan untuk diputuskan antaranya persoalan sama ada s 122(1) Akta Industri Sekuriti 1983 ('AIS 1983') — telah dimansuhkan oleh Akta Pasaran Modal dan Perkhidmatan 2007 — melanggar perkara 5(1) dan 8(1) Perlembagaan Persekutuan kerana ia menghapuskan hak seseorang yang kena tuduh untuk (a) dianggap tidak bersalah sehingga dibuktikan bersalah dan (b) mempunyai suatu pertuduhan jenayah terhadapnya dibuktikan oleh pihak pendakwaan melampaui keraguan yang munasabah. Mahkamah tertinggi ini juga diminta untuk menentukan sama ada s 122(1) AIS 1983 melanggar perkara 121 Perlembagaan Persekutuan dan doktrin pemisahan kuasa berdasarkan kepada Parlimen telah merampas kuasa kehakiman dengan menganggap bahawa seorang pengarah, ketua pegawai eksekutif, pegawai atau wakil suatu badan korporat telah melakukan kesalahan yang sama yang dilakukan oleh badan korporat di bawah AIS 1983 atau mana-mana peraturan-peraturan yang dibuat di bawahnya. Mahkamah Tinggi juga telah merangkakan sebagai suatu isu perlembagaan persoalan sama ada pendakwaan berterusan pihak responden atas suatu pertuduhan alternatif di bawah s 122B(a)(bb) dibaca bersama s 122(1) AIS 1983, setelah responden dilepaskan dan dibebaskan daripada pertuduhan utama di bawah s 86(b) dibaca bersama s 122C(c) Akta yang sama, melanggar perkara 7(2) Perlembagaan Persekutuan ('Perlembagaan'). Pihak responden dan seorang yang lain, kedua-duanya pengarah sebuah syarikat, telah dituduh di mahkamah sesyen dengan pertuduhan utama bersubahat dengan syarikat membuat suatu penyataan yang mengelirukan dalam laporan kewangan suku tahunan syarikat yang penyataan itu berkemungkinan mendorong orang lain untuk membeli sekuriti syarikat. Pertuduhan alternatif terhadap mereka ialah mereka telah memberikan penyataan yang mengelirukan dalam laporan suku tahunan kepada Bursa Malaysia dengan niat untuk menipu dan memandangkan mereka merupakan

pengarah syarikat pada masa yang material, mereka dianggap telah melakukan suatu kesalahan di bawah s 122B(a)(bb) dibaca bersama s 122(1) AIS 1983. Di akhir kes pendakwaan, kedua-dua tertuduh telah dilepaskan dan dibebaskan daripada pertuduhan utama tetapi mereka diperintahkan untuk membela diri terhadap pertuduhan alternatif. Kedua-dua tertuduh membantah, menyatakan bahawa pertuduhan alternatif itu tidak mengikut perlembagaan dan batal dan tidak sah disebabkan oleh peruntukan anggapan di bawah s 122(1). Mereka telah berjaya memohon kepada mahkamah bicara untuk menangguhkan prosiding dan, menurut s 30 AMK, merujuk kepada Mahkamah Tinggi untuk diputuskan persoalan sama ada s 122(1) AIS 1983 melanggar perkara 5(1) dan 8(1) Perlembagaan. Selanjutnya, Mahkamah Tinggi merangka dan merujukkan isu perlembagaan ini untuk diputuskan oleh Mahkamah Persekutuan. Seksyen 122(1) AIS 1983 memperuntukkan bahawa sekiranya suatu badan korporat telah melakukan suatu kesalahan di bawah AIS 1983 atau mana-mana peraturan-peraturan yang dibuat di bawahnya, mana-mana orang yang pada masa kesalahan dibuat merupakan seorang pengarah, ketua pegawai eksekutif, pegawai atau wakil badan korporat dianggap telah melakukan kesalahan itu kecuali dia membuktikan bahawa kesalahan itu dibuat tanpa persetujuannya atau dibiarkannya dan bahawa dia telah melaksanakan semua usaha untuk menghalang pelaksanaan kesalahan itu. Pihak responden menghujahkan bahawa s 122(1) telah melakukan tiga perkara: (a) ia menganggap B bersalah melakukan suatu kesalahan yang dilakukan oleh A, maka menggantikan anggapan tidak bersalah B dan mengecualikan pemakaian kaedah bahawa ia adalah tanggungjawab pendakwaan untuk membuktikan kesalahan; (b) ia meletakkan beban ke atas B untuk membuktikan faktor pengecualian untuk mengelakkan daripada hukuman; dan (c) ia menghukum B berdasarkan kepada perlakuan A dan oleh itu merampas kuasa mahkamah untuk menentukan kesalahan atau ketidakbersalahan, maka melanggar doktrin pengasingan kuasa.

**Diputuskan,** bahawa s 122(1) AIS 1983 adalah mengikut perlembagaan:

(1) Seksyen 122(1) AIS 1983 tidak melanggar doktrin anggapan ketidakbersalahan. Ia mengekalkan beban pembuktian, iaitu pihak pendakwaan hendaklah membuktikan suatu pertuduhan terhadap tertuduh melampaui keraguan yang munasabah dan ia mengesahkan doktrin pengasingan kuasa (lihat perenggan 61).

(2) Tidak terdapat asas untuk menyatakan bahawa s 122(1) tidak mengikut Perlembagaan. Kedua-dua pihak tidak membuat apa-apa cubaan untuk menunjukkan bagaimana s 122(1) telah atau telah tidak melebihi had yang dibenarkan atau telah atau tidak melanggar anggapan ketidakbersalahan. Memandangkan ia tidak ditunjukkan sebaliknya, anggapan yang memihak kepada mengikut perlembagaan telah tidak dipatahkan. Klausa anggapan dan beban mengakas tidak dilarang oleh perkara 5 Perlembagaan. Ia adalah sia-sia untuk menyatakan bahawa s

122(1) bercanggah dengan perlembagaan disebabkan oleh klausa anggapan dan beban mengakas itu. Seksyen 122(1) akan bercanggah dengan perlembagaan hanya jika ia kekurangan keadilan. Tetapi asas dan kesan anggapan di bawah s 122(1) adalah munasabah dan tidak melebihi apa yang sepatutnya. Hak pembelaan dikekalkan. Pembelaan statutori itu memberikan peluang kepada seseorang tertuduh untuk mematahkan anggapan itu dan ia adalah betul bahawa seseorang tertuduh hendaklah membuktikan perkara yang dinyatakan dalam pembelaan statutori. Terdapat imbangan antara kepentingan komuniti secara am dengan melindungi hak asasi (lihat perenggan 47 & 52).

(3) Matlamat keterangan di bawah AIS ialah untuk mengawal industri, mempromosi keyakinan am terhadap integriti pasaran saham dan menghukum orang yang melanggar dengan liabiliti jenayah dan sivil. Maka adalah munasabah bahawa s 122(1) memperuntukkan bahawa pengarah dan/atau pegawai hendaklah dianggap telah melakukan kesalahan yang dilakukan oleh korporat 'kecuali ...'. Bagi mencapai matlamat AIS, kesalahan oleh korporat hendaklah dibahagikan, dan dengan betulnya, kepada manusia, iaitu pengarah dan/atau pegawainya. Anggapan itu bukan sahaja adil tetapi adalah perlu untuk melindungi pasaran saham (lihat perenggan 48).

(4) Anggapan ketidakbersalahan menghendaki pihak pendakwaan untuk membuktikan kesalahan seseorang tertuduh melampaui keraguan munasabah. Di bawah s 122(1), kesalahan korporat hendaklah dibuktikan terlebih dahulu sebelum anggapan boleh digunakan terhadap pengarah dan/atau pegawai. Walaupun seksyen itu memperuntukkan bahawa pengarah dan/atau pegawai korporat hendaklah dianggap telah melakukan kesalahan korporat, tidak terdapat pelepasan dalam beban atau standard pembuktian. Pihak pendakwaan perlu membuktikan kesalahan melebihi keraguan yang munasabah sebelum peruntukkan anggapan itu terpakai. Maka, tidak terdapat salah letak berhubung dengan anggapan ketidakbersalahan (lihat perenggan 49).

(5) Tidak terdapat merit dalam hujahan bahawa s 122(1) menganggap bahawa B bersalah melakukan suatu kesalahan yang dilakukan oleh A. Seksyen 122(1) hanya menganggap bahawa B melakukan kesalahan yang dilakukan oleh A hanya kerana B boleh menyebabkan atau memotivasikan A untuk melakukan kesalahan 'kecuali ...'. 'Proviso kecuali' tidak meletakkan beban ke atas B untuk membuktikan untuk membuktikan faktor pengecualian untuk mengelak hukuman tetapi memberi B peluang untuk mematahkan peruntukan anggapan dengan memperuntukkan pembelaan statutori iaitu ketiadaan pengetahuan, persetujuan atau pembiaran oleh pengarah atau pegawai, yang merupakan perkara yang secara jelasnya dalam pengetahuan pengarah dan/atau pegawai. Maka adalah adil perkara ketiadaan pengetahuan,

persetujuan atau pembiaran itu dibuktikan oleh tertuduh. Ia merupakan suatu pembelaan statutori dan tiada pendakwaan yang mempunyai beban untuk membuktikan pembelaan, statutori atau sebaliknya (lihat perenggan 50).

(6) Hujahan bahawa s 122(1) telah melanggar doktrin pengasingan kuasa kerana ia merupakan sesuatu yang menghukum, dan bukan berbentuk keterangan, tentang kesalahan B, tidak mempunyai merit langsung. Seksyen 122(1) hanyalah peruntukan yang mencipta kesalahan dan penghakiman kesalahan atau ketidakbersalahan diberikan kepada mahkamah dengan kebebasan untuk membuat keputusan. Jika s 122(1) telah dihakimi atas kesalahan, maka pihak responden tidak akan dibicarakan tetapi dijatuhkan hukuman pada ketika ia dibuktikan bahawa pihak korporat telah melakukan kesalahan. Tetapi pembelaannya dipanggil. Seksyen 122(1) memberi peluang kepada responden untuk mematahkan anggapan bahawa beliau telah melakukan kesalahan yang dilakukan oleh pihak korporat. Kesalahan atau ketidakbersalahan belum lagi diputuskan bergantung kepada pembelaan responden (lihat perenggan 51).

(7) Persoalan sama ada penerusan pendakwaan ke atas responden bagi pertuduhan alternatif selepas pelepasan dan pembebasan responden atas pertuduhan utama telah melanggar perkara 7(2) Perlembagaan tidak sewajarnya diterima oleh mahkamah di bawah sebagai suatu 'isu perlembagaan'. Secara asasnya, isu itu hanyalah suatu rayuan *autrefois acquit* yang hanya terpakai apabila seseorang tertuduh dituduh dengan pertuduhan yang sama yang tertuduh itu telah dilepaskan dan dibebaskan. Inti pati pertuduhan utama dan pertuduhan alternatif adalah berbeza dari segi fakta dan undang-undang. Rayuan *autrefois acquit* tidak mungkin berjaya (lihat perenggan 56 & 60).]

**Notes**

For cases on validity of impugned legislation, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2989–2998.

**Cases referred to**

*Attorney General of Hong Kong v Lee Kwong-kut; Attorney General of Hong Kong v Lo Chak-man and another* [1993] 3 All ER 939, PC (refd)
*AG v Malta* App No 16641/90 (10 December 1991, unreported) (refd)
*Abdul Aziz bin Miew Yiong v PP* [2015] 3 MLJ 556, CA (refd)
*Abdul Razak bin Dalek v PP* [2010] 4 MLJ 725, FC (refd)
*Abdullah bin Jacomah v PP* [2002] 6 MLJ 324, HC (refd)
*Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1, FC (refd)
*Ashok v State of Himachal v Pradesh* AIR 2005 SC 614; (2005) 2 SCC 104 (refd)

A *Attorney General's Reference (No 4 of 2002)* [2003] EWCA Crim 762; [2004] 1 All ER 1, CA (refd)
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*Attorney-General of the Gambia v Momodou Jobe* [1984] AC 689, PC (refd)
B *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521, FC (refd)
*Bates v UK* [1996] EHRR 312 (refd)
*Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297, FC (refd)
C *Boyce and another v The Queen* [2004] 3 WLR 786, PC (refd)
*Brown v UK* (2002) 35 EHRR CD 197 (refd)
*Browne (Greene) v R* (1999) 54 WIR 213, PC (refd)
*Chan Kwee Fong v PP* [2010] 1 MLJ 441, CA (refd)
*Che Ani bin Itam v PP* [1984] 1 MLJ 113, FC (refd)
D *Coffin v United States* 156 US 432 (1895); 15 S Ct 394 (refd)
*Connelly v Director of Public Prosecutions* [1964] AC 1254, HL (refd)
*Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (distd)
*Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed* E *Idrus* [1981] 1 MLJ 29, FC (refd)
*Dato' Seri Anwar bin Ibrahim v PP* [2004] 1 MLJ 177, CA (refd)
*Deputy Chief Officer, Perak & Anor v Ramesh a/l Thangaraju* [2001] 1 MLJ 161, CA (refd)
*Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411, PC F (refd)
*Enthiran a/l Rajoo v PP* [2016] 1 MLJ 71, CA (refd)
*Gan Boon Aun v PP* [2016] 4 MLJ 265, FC (refd)
*H v UK* App No 15023/89 (4 April 1990, unreported) (refd)
*Harmenderpall Singh a/l Jagara Singh v PP* [2005] 2 MLJ 542, HC (refd)
G *Heaney v Ireland* (2001) 33 EHRR 264 (refd)
*Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)* [1977] AC 195; [1976] 1 All ER 353, PC (refd)
*Hoang v France* (1993) 16 EHRR 53 (refd)
H *Hunter Douglas Australia Pty v Perma Blinds* [1970] 122 CLR 49, HC (refd)
*Ikau Anak Mail v PP* [1973] 2 MLJ 153, FC (refd)
*Janosevic v Sweden* (2004) 38 EHRR 473 (refd)
*Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289, CA (refd)
I *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520, HC (refd)
*Lee Keng Guan & Ors v PP* [1977] 2 MLJ 95, CA (refd)
*Lee Kwan Woh v PP* [2009] 5 MLJ 301, FC (refd)
*Lee v New South Wales Crime Commission* [2013] 302 ALR 363, HC (refd)
*Loo Ting Meng v PP* [2014] 6 MLJ 208, FC (refd)

*Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, SC (refd)
*Mary Ng v The Queen* [1958] AC 173, PC (refd)
*Mat Shuhaimi bin Shafiei v PP* [2014] 2 MLJ 145, CA (refd)
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*Nagappan a/l Kuppusamy v PP* [1988] 2 MLJ 53, SC (refd)
*Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64, PC (refd)
*Ooi Kean Thong & Anor v PP* [2006] 3 MLJ 389; [2006] 2 CLJ 701, FC (refd)
*Palautah a/l Sinnappayan & Anor v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 295, FC (refd)
*Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* [2007] 6 MLJ 709, HC (refd)
*Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, FC (refd)
*Porras v Netherlands* App No 49226/99 (18 January 2000, unreported) (refd)
*PP v Alang Mat Nasir bin Anjang Talib; PP v Chen Lip* [1938] 1 MLJ 153 (refd)
*PP v Azilah bin Hadri & Anor* [2015] 1 MLJ 617, FC (refd)
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*PP v Chee Cheong Hin Constance* [2006] 2 SLR 24, HC (refd)
*PP v Choo Chuan Wang* [1992] 2 CLJ 1242, HC (refd)
*PP v Dato' Yap Peng* [1987] 2 MLJ 311, SC (refd)
*PP v Gan Boon Aun* [2015] 6 MLJ 32, CA (refd)
*PP v Gan Boon Aun & Anor* [2012] MLJU 1225, HC (refd)
*PP v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)
*PP v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
*PP v Neoh Wan Kee* [1985] 1 MLJ 368 (refd)
*PP v Pung Chen Choon* [1994] 1 MLJ 566, SC (refd)
*PP v Su Liang Yu* [1976] 2 MLJ 128 (refd)
*PP v Yuvaraj* [1969] 2 MLJ 89, PC (refd)
*R Rajagopal v State of TN* 1995 AIR 264; [1994] SCC (6) 632, SC (refd)
*R v Carass* [2001] EWCA Crim 2845, CA (refd)
*R v Director of Public Prosecutions ex parte Kebilene* [1999] 3 WLR 972, HL (refd)
*R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884, HL (refd)
*R v Lambert* [2001] UKHL 37; [2001] 3 All ER 577, HL (refd)
*R v Makuwa* [2006] EWCA Crim 175, CA (refd)
*R v Whyte* (1988) 51 DLR (4th) 481, SC (refd)
*Ramiah v PP* [1986] 1 MLJ 301, FC (refd)
*Ranjitsing Brahmajeetsing v State of Maharashtra & Anor* (2005) 5 SCC 294, SC (refd)
*Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372, HC (refd)
*Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri &*

*Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108, FC (refd)
*Rikky Purba v PP* [2014] 4 MLJ 569, CA (refd)
*Robinson v Secretary of State for Northern Ireland and others* [2002] NI 390, HL (refd)
*Salabiaku v France* (1988) 13 EHRR 379 (refd)
*Selvanayagam v United Kingdom* App No 57981/00 (12 December 2002, unreported) (refd)
*Shamim Reza bin Abdul Samad v PP* [2011] 1 MLJ 471, FC (refd)
*Sheldrake v Director of Public Prosecutions* [2003] EWHC 273, QB (refd)
*Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237, HL (refd)
*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2006] 1 MLJ 727, CA (refd)
*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, FC (refd)
*State of Bihar & Ors v Bihar Distillery Ltd* 1997 AIR SC 1511, SC (refd)
*State of Mauritius v Khoyratty* [2007] 1 AC 80, PC (refd)
*State v Coetzee* [1997] 2 LRC 593 (distd)
*Sum Yat Loy lwn Pendakwa Raya* [2013] 4 MLJ 762, CA (refd)
*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, CA (refd)
*Telfner v Austria* (2002) 34 EHRR 207 (refd)
*Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765, FC (refd)
*Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1; [1935] AC 462, HL (consd)

**Legislation referred to**

Arms Act 1960
Capital Markets and Services Act 2007
Civil Law Act 1956
Constitution of the Republic of Singapore [SG] arts 9(1), 12(1)
Courts of Judicature Act 1964 ss 30, 30(2), 84, 84(3), (4), 85
Constitution of Malta [MLT] art 40(5)
Criminal Procedure Code ss 173(h)(iii), 180(4), 402A(2)
Customs Act 1967
Dangerous Drugs Act 1952 s 37(d)
Evidence Act 1950 ss 103, Illustration (b), 105, 106, 108
Federal Constitution arts 5, 5(1), 6(2), 7(2), 8, 8(1), 10, 21, 121, 160(2)
Human Rights Act 1998 [UK] Schedule 1
Interpretation Act [MLT] art 13
Interpretation Acts 1948 and 1967 s 66
Malaysian Anti-Corruption Commission Act 2009

Misuse of Drugs Act 1971 ss 5, 28(2), (3)
Penal Code s 107
Police Act 1967
Prevention of Terrorism (Temporary Provisions) Act 1989 s 16A
Road Traffic Act 1988 [UK] ss 3(1), 5(1)(b), (2)
Securities Industry Act 1983 ss 86, 86(b), 88B, 122(1), 122B(a)(bb), 122C(c), Parts III, IV, V, VI, VII, IX, X
South Africa Constitution [SA] art 35(3)
Terrorism Act 2000 s 11, 11(1), (2)
The Australian Constitution [AUS]

*Awang Armadajaya bin Awang Mahmud (Shanti Geoffrey, Mohd Hafiz bin Mohd Yusoff and Munira bt Masood with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.*

*Gopal Sri Ram (NS Guok and David Hii with him) (Guok Partnership); Tan Hock Chuan (K Kumaraendran, Cains Tan and Lee Wenxu with him) (Tan Hock Chuan & Co) for the respondent.*

**Jeffrey Tan FCJ (delivering judgment of the court):**

**[1]** On 9 May 2016, the High Court, under ss 84(4) and 85 of the Courts of Judicature Act 1964 ('the CJA'), framed and referred the following 'constitutional issues' to this court for determination:

(a) whether s 122(1) of the Securities Industry Act 1983 ('the SIA 1983') violates arts 5(1) and 8(1) of the Federal Constitution on the basis that it abrogates the fundamental right of an accused person to be presumed innocent until proven guilty?

(b) whether s 122(1) of the SIA 1983 violates arts 5(1) and 8(1) of the Federal Constitution on the basis that it abrogates the fundamental right of an accused that a criminal charge must be proven by the prosecution against the accused beyond reasonable doubt?

(c) whether s 122(1) of the SIA 1983 violates art 121 of the Federal Constitution and the doctrine of separation of powers on the basis that it usurps the judicial powers of the court by deeming that a director, chief executive officer or representative of the body corporate has committed an offence where an offence has been committed by the body corporate?

(d) whether the continued prosecution of the accused in this case for the alternative charge under s 122(1) of the SIA 1983 after his acquittal on the principal charge under s 86 of the same Act is in violation of art 7(2) of the Federal Constitution? and

(e) whether an arbitrary and indiscriminate use of s 122(1) of the SIA 1983

as alternative charge in this case is inconsistent with art 8(1) of the Federal Constitution?

**[2]** The respondent and one Khiudin bin Mohd, both directors of Transmile Group Bhd were charged at the sessions court with the commission of the following offences under the Securities Industry Act 1983 ('the SIA') (since repealed by the Capital Markets and Services Act 2007 which came into force on 28 September 2007):

Principal Charge

That you, between 28.2.2006 to 15.2.2007 at Bursa Malaysia abetted Transmile Group Berhad in making a statement that is misleading in a material particular in Transmile Group Berhad's 'Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31.12.2006 and the misleading statement is underlined in red in the appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement was made Transmile Group Berhad ought reasonably to have known that the statement is misleading in a material particular, and you have thereby committed an offence under section 86(b) read together with section 122C(c) of the Securities Industry Act 1983 and punishable under section 88B of the same Act.

Alternative charge

That Transmile Group Berhad between 14.2.2007 and 15.2.2007 at Bursa Malaysia has committed an offence under section 122B(a)(bb) of the Securities Industry Act 1983 when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia in Transmile Group Berhad's 'Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31.12.2006 and the misleading statement is underlined in red in the appendix to this charge and that you, who at the time of the commission of the offence was a director of Transmile Group Berhad, are deemed to have committed an offence under section 122B(a)(bb) read together with section 122(1) of the Securities Industry Act 1983, and punishable under section 122B of the same Act.

**[3]** At the close of the prosecution case, the trial court acquitted the respondent and Khiudin bin Mohd of the principal charge, but ordered their defence to be entered on the alternative charge. But the respondent and Khiudin bin Mohd raised objection to the alternative charge, which they contended was unconstitutional and therefore null and void by reason of the deeming provision in the said s 122. The respondent and Khiudin bin Mohd then successfully applied to the trial court, pursuant to s 30 of the CJA, to stay the proceedings and to refer the question 'Whether s 122(1) of the Securities Industry Act 1983 (Act 280) violates arts 5(1) and 8(1) of the Federal Constitution?' to the High Court.

Section 30 of the CJA provides as follows:

(1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.

(2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

(3) Subsections (1) and (2) shall be deemed to be rules of court for the purposes of Article 128(2) of the Constitution.

**[4]** Section 30(2) of the CJA provides, 'where the High Court considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84' which reads:

(1) Where in any proceedings in the High Court a question arises as to the effect of any provision of Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

(2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.

(3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.

(4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

**[5]** Pursuant to s 84 of the CJA, 'where in any proceedings ... a question arises as to the effect of any provision of Constitution the judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court', the High Court shall settle the facts to assist the Federal Court in deciding the question, and state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case. There cannot be a stay of proceedings if the High Court

decides that no question arises as to the effect of any provision of the Constitution. The proceedings are to continue. If it were a reference under s 30 of the CJA, the High Court shall transmit the record back to the trial court for continuation of the proceedings. There can only be a stay of proceedings if the High Court decides that a question arises as to the effect of any provision of the Constitution, in which case, the High Court shall state the question in the form of a special case and settle the facts to assist the Federal Court in deciding the question. The High Court is to await the decision of the question by the Federal Court. It is not within the sphere of the High Court to decide on the question. But in the instant case, where it was not supposed to, the High Court (not the High Court below) decided on the question and ruled (see *Public Prosecutor v Gan Boon Aun & Anor* [2012] MLJU 1225) that s 122(1) was unconstitutional, and acquitted the respondent and Khiudin bin Mohd. On appeal, which was only lodged against the respondent, the Court of Appeal held (see *Public Prosecutor v Gan Boon Aun* [2015] 6 MLJ 32) that s 122(1) was constitutional. On further appeal, the Federal Court ruled (see *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265) that only the Federal Court has the jurisdiction, in a s 30 reference, to determine a question as to the effect of any provision of the Constitution, that the High Court in *Public Prosecutor v Gan Boon Aun & Anor* [2012] MLJU 1225 had no jurisdiction to decide on that question or to acquit the respondent, and that the Court of Appeal in *Public Prosecutor v Gan Boon Aun* [2015] 6 MLJ 32, which was only seized with jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction or in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a sessions court, had no jurisdiction to hear the so called 'appeal' against the decision made by the High Court. The Federal Court then struck out what it held was an incompetent appeal, set aside the orders of the High Court and Court of Appeal, and remitted the matter back to the High Court with an order 'that the High Court judge shall consider, if any, and state the question, which in his/her opinion has arisen as to the effect of the provision of the Constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative and transmit the same to the Federal Court for determination pursuant to s 84(3) and (4) of the CJA'. Pursuant to that latter order of the Federal Court, the High Court (a different court) framed and referred the aforesaid 'constitutional issues' to this court for determination.

**[6]** Only 'constitutional issues' 1–3 relate directly to the constitutionality or otherwise of s 122(1) which provided:

> (1) Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have

committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

**[7]** In s 122(1), there was (a) a presumption that an offence against this Act or any regulation made thereunder committed by a body corporate is committed by any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity; and (b) a reverse onus clause which imposed on that person the onus to prove that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

**[8]** The first remark of the learned deputy public prosecutor before us was that the said constitutional issues presumed that s 122(1) was inconsistent with arts 5, 7(2), 8, and 121 of the Federal Constitution. His next remark was actually a reminder that there is a presumption on the constitutionality of an enactment which shifts the onus to the party who asserts otherwise to show the invalidity of the impugned provision (learned deputy public prosecutor cited *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128, *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701, and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72). Indeed, 'as Jeevan Reddy J said in *State of Bihar & Ors v Bihar Distillery Ltd* 1997 AIR SC 1511: 'The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it' *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289, per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court; see also *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297). When there is a challenge to the constitutionality of a provision, the presumption in favour of constitutionality shifts the onus to the party who asserts otherwise to show that there has been a transgression of the Constitution (*Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128, *Lee Keng Guan & Ors v Public Prosecutor* [1977] 2 MLJ 95, *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, *Harmenderpall Singh a/l Jagara Singh v Public Prosecutor* [2005] 2 MLJ 542, *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2006] 1 MLJ 727, *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389, *Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* [2007] 6 MLJ 709, *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ

145, and *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751).

**[9]** With a shift in the onus, there should be a switch in the focus, to the submission of the respondent, which could be summarised as follows. In its proper construction, s 122(1) did three things: (a) it deemed B guilty of an offence committed by A and thereby displaced the presumption of innocence; it dispensed with the rule that it is for the prosecution to prove guilt; (b) it placed the onus on B to prove the excusing factors to avoid punishment; and (c) it adjudicated upon the guilt of B based on A's conduct. That latter interpretation is supported by the decision of the Constitutional Court of South Africa in *State v Coetzee* [1997] 2 LRC 593, in particular at paras 38–40, 42 and 46, and by the Canadian decisions referred to in *Coetzee*. Section 122 was not evidential but presumptive of guilt, was unconstitutional and void, as it did away with the presumption of innocence and violated the doctrine of the separation of powers. Article 35(3) of the South Africa Constitution is not found in our Constitution. But fundamental rights must be interpreted generously and liberally. The approach to interpretation taken in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701, where the Civil Law Act 1956 was the statute of reference, is wrong. The rule of literal interpretation does not apply to the Constitution (counsel cited *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521, *Boyce and another v The Queen* [2004] 3 WLR 786, *Robinson v Secretary of State for Northern Ireland and others* [2002] NI 390, *Attorney-General of the Gambia v Momodou Jobe* [1984] AC 689, *Ashok v State of Himachal v Pradesh* AIR 2005 SC 614; (2005) 2 SCC 104, and *Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)* [1976] 1 All ER 353). The presumption of innocence is a basic right conferred upon an accused by the common law of England (counsel cited *Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1; [1935] AC 462). In *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765, the Federal Court accepted the requirement of a minimum standard of procedural and substantive fairness. In *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, the Privy Council held that the principle that the prosecution must prove its case against an accused beyond reasonable doubt was fundamental to the administration of justice under the common law. This means that the presumption of innocence is a fundamental right at common law just as access to justice is a common law fundamental right. It is a right that falls within art 5(1) of the Constitution, as the definition of 'law' in art 160(2) and s 66 of the Interpretation Acts 1948 and 1967 includes written law and the common law of England. In *Ranjitsing Brahmajeetsing v State of Maharashtra & Anor* (2005) 5 SCC 294 and in *R Rajagopal v State of TN* 1995 AIR 264; [1994] SCC (6) 632, the Indian Supreme Court held that the presumption of innocence is a human right protected by art 21. The Australian Constitution

does not have a chapter on fundamental rights. Yet it was held by the High Court of Australia in *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520 that the freedom of communication is to be implied into the Constitution arising from those provisions that deal with the holding of elections. The deeming provision housed in s 122(1) was not evidential. The deeming provision vested adjudicatory power in the Legislature. It passed judgment (counsel cited *Hunter Douglas Australia Pty v Perma Blinds* [1970] 122 CLR 49 at pp 62 and 65). The power to determine is a judicial power (counsel cited *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311). By vesting judicial power unto itself, Parliament acted in violation of the doctrine of the separation of powers which is a feature of the Constitution. There will not be an express provision that embodies the doctrine and specifies that a breach of it will render an Act void (counsel cited *Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)* [1977] AC 195; [1976] 1 All ER 353 (PC), *State of Mauritius v Khoyratty* [2007] 1 AC 80 at pp 101–103 and 107–108). The decision in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341 is wrong, in that it looked for an express provision that was violated. *Kok Wah Kwan* is in conflict with the decisions of the Privy Council in *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 and *Browne (Greene) v R* (1999) 54 WIR 213, where it was held that the power to detain a person at the pleasure of the Crown was in the nature of punishment which was exercisable by the judiciary under the doctrine of separation of powers. Exercise by the executive constituted a breach of the doctrine of separation of powers and is therefore void. A court must look at the substance of an enactment to determine whether it imposes a legal or an evidential burden on an accused. Section 122(1) did away with the presumption of innocence. The deeming provision should be read as a determination of guilt and not as an evidentiary provision.

**[10]** As we see it, the presumption of innocence, sometimes referred to by the Latin expression *Ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on the one who declares, not on one who denies), is the principle that one is considered innocent unless proven guilty, and that 'the presumption of innocence, the privilege against self-incrimination and the right to silence are important elements of the 'accusatorial system of justice' which generally prevails in the common law world' (*Lee v New South Wales Crime Commission* [2013] 302 ALR 363 per French CJ). 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law' (*Coffin v United States* 156 US 432 (1895); 15 S Ct 394;). That burden of proof on the prosecution was famously referred to as the 'golden thread' in the criminal law by Lord Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1:

> Throughout the web of the English criminal law one golden thread is always to be seen — that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

**[11]** The presumption of innocence is that important that it is explicitly enshrined in many legal codes and constitutions. It is not explicitly included in our legal code or Federal Constitution. But art 5(1) of the Federal Constitution explicitly provides that 'No person shall be deprived of his life or personal liberty save in accordance with law'. Pertinent to the meaning of that phrase, it should be first observed that the ordinary rules of construction do not apply in the case of the articles of the Federal Constitution. In *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 (PC), it was contended that the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provision contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. Lord Diplock, delivering the judgment of the board, disagreed. On arts 9(1) and 12(1) of the Constitution of the Republic of Singapore which are identical to arts 5(1) and 8(1) of the Federal Constitution, Lord Diplock said:

> ... Their Lordships would repeat what this Board has said on many previous occasions and most recently through Lord Wilberforce in *Minister of Home Affairs & Anor v Fisher & Anor* [1980] AC 319 at p 329: that the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but 'as *sui generis*, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law'. As in that case, which concerned fundamental rights and freedoms of the individual guaranteed by the Bermuda Constitution, Their Lordships would give to Part IV of the Singapore Constitution 'a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the (fundamental liberties) referred to.
>
> Accordingly Their Lordships are unable to accept the narrow view of the effect of arts 9(1) and 12(1) for which counsel for the public prosecutor contended. This was that since 'written law' is defined in art 2(1) to mean 'this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore' and 'law' is defined as including 'written law', the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provision contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. To the full breadth of this contention one limitation only was conceded: the arbitrariness, the disregard of fundamental rules of natural justice for which the Act provides must be of general application to all citizens of

Singapore so as to avoid falling foul of the anti-discriminatory provisions of art 12(1). A

Even on the most literalist approach to the construction of the Constitution this argument in Their Lordships' view involves the logical fallacy of *petitio principii*. The definition of 'written law' includes provisions of Acts passed by the Parliament of Singapore only to the extent that they are 'for the time being in force in Singapore'; and art 4 provides that 'any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. So the use of the expression 'law' in arts 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after September 16, 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void. B C

In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in Their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery. D E F

**[12]** Raja Azlan Shah Ag LP (as HRH then was) in *Dato' Menteri Othman Baginda & Anor* also underlined that the Federal Constitution must be construed broadly: G

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see Minister of *Minister of Home Affairs and another v Fisher and another* [1979] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument, and to be H I

guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney General of Saint Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129 at p 136.

Basically, a Constitution being the supreme law of a state or federation, it has to be interpreted differently from ordinary statute. On this point the Privy Council in *Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)* [1976] 1 All ER 353, inter alia, said: 'To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would ... be misleading' (*Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285 per Arifin Zakaria CJ (Malaya), as he then was, delivering the judgment of the court; see also *His Royal Highness Sultan Ismail Petra Ibni Almarhum Sultan Yahya Petra v His Royal Highness Tengku Mahkota Tengku Muhammad Faris Petra & Anor and another suit* [2011] 1 MLJ 1, and *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 where the same passage from *Hinds v The Queen* was quoted by the Federal Court). '...the Federal Constitution ... Though by definition it is a written law (see s 66 of the Consolidated Interpretation Acts of 1948 and 1967) it is not an ordinary statute. Hence, it ought not to be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes ... To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in Their Lordships' view, be misleading ... the Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II' (*Lee Kwan Woh v Public Prosecutor*). 'Our Federal Constitution is a living document and without doing violence to the language used the said ... Federal Constitution should receive a fair, liberal and progressive construction so that its true objects must be promoted (see *Legislation and Interpretation* by Jagadish Swarup at pp 479–480)' (*Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 per Zulkefli FCJ, as he then was). 'A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction' (*Attorney-General of the Gambia v Momodou Jobe* [1984] AC 689 at p 700 per Lord Diplock; see also *Vasquez v R* [1994] 3 All ER 674 at p 682 per Lord Jauncey) to avoid what has been called (in the phrase of Professor de Smith in *de Smith, The New Commonwealth and its Constitutions* (1964), p 194) 'the austerity of tabulated legalism' (*Minister of Home Affairs and another v Fisher and another* [1979] 3 All ER 21; [1980] AC 319 at p 328 per Lord Wilberforce) and to interpret fundamental rights and freedoms in a manner 'to ensure that the rights are 'practical and effective' ' (*R v Mist* [2006] 3

NZLR 145 at para 45 per Keith J; *Morgan v Superintendent Rimutaka Prison* [2005] 3 NZLR 1 at para 25 per Elias CJ; *Flynn v Her Majesty's Advocate* 2004 SLT 863 at para 44 per Lord Hope). '... a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effect to the rights, values and standards expressed in a constitution as these evolve over time' (*Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 at para 34 per Lord Bingham, Lord Nicholls, Lord Steyn and Lord Walker).

**[13]** Consonant with the generous and liberal construction conferred the Federal Constitution, it was held that the phrase 'in accordance with law' in art 5(1) 'is wide enough to cover procedure as well' (*Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108) and which procedure must not be arbitrary or unfair (*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & anor* [1996] 1 MLJ 261), implies a fair trial (*Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471) in both procedure and substance (*Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; see also *Deputy Chief Officer, Perak & Anor v Ramesh a/l Thangaraju* [2001] 1 MLJ 161), within a reasonable time by an impartial court established by law (*Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242), and, accords a fundamental right of access to justice (*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333). It was also enunciated that art 5(1) 'guarantees that neither life nor personal liberty may be deprived save in accordance with law' (*Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471 per Gopal Sri Ram FCJ, delivering the judgment of the court), and that art 5(1) 'stipulates that no person shall be deprived of his life or personal liberty save in accordance with law ... this right to personal liberty is not absolute and is subject to qualifications. The key to the issue herein lies in the phrase 'save in accordance with law'. Hence, no person (including the respondent) can be arrested, detained or imprisoned unless authorised by law (see *An Introduction to the Constitution of Malaysia* by Tun Mohamed Suffian bin Hashim, (2nd Ed), at p 207) ... It is important therefore to consider the phrase 'save in accordance with law'. In *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372, it was held that the phrase 'save in accordance with law' in art 5(1) requires that there must be specific and explicit law that actually provides for it. The Federal Court in the case of *Che Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113 adopted the meaning of the word 'law' in the phrase 'save in accordance with law' in art 5(1) given by the Privy Council in the Singapore case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, where it was held that the term 'law' in the phrase refers to: ... a system of law which incorporates those fundamental rules of natural justice that had formed part of the common law of England and was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that 'law' which

citizens could have for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules' (*Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785 per Azahar Mohamed JCA, as he then was, delivering the judgment of the court).

**[14]** Pertinent to 'law' in the phrase 'in accordance with law', art 160(2) of the Federal Constitution stipulates that 'Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof', with that common law being the common law of England (see art 160(2) of the Federal Constitution read with s 66 of the Interpretation Acts 1948 and 1967). Article 160(2) uses the word 'includes'. Hence, art 160(2) is a non-exhaustive definition. The phrase 'in accordance with law' does not merely refer to domestic law but also to the rule of law (see *R v Lambert* [2001] UKHL 37 at para 150 per Lord Clyde), it includes the doctrine of presumption of innocence, and does not exclude case law, judge made law, legal doctrines established by judicial precedents, or whatever that has the force of law.

**[15]** In England, the presumption of innocence is '... historically part of the common law ...' (*R v Makuwa* [2006] EWCA Crim 175 per Moore-Bick LJ) '... long before its embodiment in the (European Convention on Human Rights)' (*R v Lambert* [2001] UKHL 37 per Lord Clyde). In Malaysia, the presumption of innocence is an integral part of the Evidence Act 1950. 'In particular, sections 101 and 102 provided in effect that in a criminal case it is for the prosecution to prove the guilt of the accused person' (*Nagappan a/l Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the court). 'Section 101 of the Evidence Enactment throws the burden on the prosecution to prove the guilt of the accused. Nowhere in the Enactment is there any suggestion that that burden ever shifts. Section 105 merely says that if the accused seeks to establish certain circumstances the burden of proving those circumstances is upon him. In order to discharge the burden of proof which the prosecution has undertaken, it has to prove every ingredient which goes to make up the offence charged' (*Public Prosecutor v Alang Mat Nasir bin Anjang Talib; Public Prosecutor v Chen Lip* [1938] 1 MLJ 153, per Whitley Ag CJ). '... a prima facie case is made out ... where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction' (ss 173(h)(iii) and 180(4) of the Criminal Procedure Code). 'If the court ... at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other hand, the court ... comes to the conclusion that a prima facie case has been made out, it must call for the defence' (*Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 per

Gopal Sri Ram JCA, as he then was, delivering the judgment of the Federal Court). '... it is always the duty of the prosecution to prove an accused person's guilt, and not the duty of the defence to prove anything, in order to rebut the prosecution's case or his guilt the accused person needs only to cast a reasonable doubt over it (*Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368; *Abdullah bin Jacomah v Public Prosecutor* [2002] 6 MLJ 324)' (*Loo Ting Meng v Public Prosecutor* [2014] 6 MLJ 208 per Suriyadi FCJ, delivering the judgment of the court). The underlying reason for all that is because of the presumption of innocence, which is a fundamental principle (*Ramiah v Public Prosecutor* [1986] 1 MLJ 301), a cardinal principle (*Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1), of our criminal law.

**[16]** But there is a limit to what the prosecution could or could reasonably be expected to prove. 'There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence. The position is the same with regard to insanity, which was one of the exceptions identified by Viscount Sankey LC in the passage of *Woolmington v Director of Public Prosecutions* [1935] AC 462 at p 481 ...'; (*Attorney General of Hong Kong v Lee Kwong-kut; Attorney General of Hong Kong v Lo Chak-man and another* [1993] 3 All ER 939 at p 950 per Lord Woolf). '... some inroads have of recent times been made upon this orthodox principle, and in many jurisdictions it is accepted that a burden of proof may for certain sorts of facts be upon the accused. Certainly, the second burden (in *Woolmington*) ie the duty of producing some evidence, ought in some instances to be upon the accused. The absence of affirmative pleadings in defense is no insuperable objection to such a result. The judicial experience with certain issues on criminal trials has seemed to justify such exceptions; and the fixing of a particular fact on this or the other party as a part of his case is in general only a question of sound policy as based on experience ... A few courts seem in general to place on the accused some sort of burden of proof for any fact in the nature of *excuse* or *mitigation*. A few courts seem to place upon the accused the burden of showing that he acted in *self-defense* but he ought at least to have the duty of coming forward with some evidence ...' (§2512 at pp 537–543, Vol 9, *Wigmore on Evidence* (Chadbourn Revision 1981)).

**[17]** There are exceptions to the general rule that an accused bears no onus of proof. Section 103 of the EA provides that 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its

existence, unless it is provided by any law that the proof of that fact shall lie on any particular person'. Illustration (b) to s 103 specifically requires B, who 'wishes the court to believe that at the time in question he was elsewhere', to prove it. Section 103 of the EA requires a defence of alibi to be proved by the accused (see *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 1 MLJ 177, which effectively held, and we agree, that s 103 of the EA is the provision, not s 402A(2) of the CPC, that governs the defence of alibi; see also *Law of Evidence in Malaysia and Singapore* by Rafiah Salim at p 10, where the learned author commented, and we agree, that s 402A(2) of the CPC only deals with the procedure to be followed when the defence of alibi is introduced).

**[18]** Section 105 of the EA provides 'When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances'. Once the prosecution has made out a prima facie case, an accused has the onus to prove the special exception in the statute (*Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725 at para 19 per Raus Sharif FCJ, as he then was, delivering judgment of the court) 'on a balance of probabilities — see *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153' (*Enthiran a/l Rajoo v Public Prosecutor* [2016] 1 MLJ 71 per Ahmadi Asnawi JCA, delivering the judgment of the court; see also *Abdul Aziz bin Miew Yiong v Public Prosecutor* [2015] 3 MLJ 556, *Rikky Purba v Public Prosecutor* [2014] 4 MLJ 569, *Sum Yat Loy lwn Pendakwa Raya* [2013] 4 MLJ 762, *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441, where in each of those appeals, the Court of Appeal held that an exception must be proved on a balance of probabilities, which is the position under common law — see also *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237 at para 4; in *Mrs Thitapha Charoenchuea lwn Pendakwa Raya* [2016] 6 MLJ 549, it was recently reaffirmed by the Federal Court per Arifin Zakaria CJ, delivering the judgment of the court, that the presumption under s 37(d) of the Dangerous Drugs Act is to be rebutted on a balance of probabilities).

**[19]** Section 106 of the EA which provides 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him' is a further exception. 'This enigmatic section is intended to address exceptional circumstances in which it would not be possible or particularly difficult for a party ('the first party') to prove a fact which is only known to the other party ('the second party'), or which can be accessed by the second party with relative ease but cannot be accessed by the first party without considerable difficulty ... the courts have been particularly careful about ensuring that the

accused is not required to disprove the elements of the offence on the basis that he is in a better position to know about the circumstances. For example, in *Mary Ng v The Queen* [1958] AC 173 (which involved a charge of attempted cheating), the Privy Council advised that it was not for the appellant to prove that she had not acted deceitfully; rather it was for the prosecution to prove that she had so acted. In the more recent case of *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR 24 at p 95, VK Rajah J emphasised that s 108 (equipollent of s 106 of the EA) does not impose any burden on the accused to prove that no crime was committed and cannot relieve the prosecution from its burden of proof. The scope of the section is 'to certain exceptional cases where it would be impossible or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' or 'particularly' within the knowledge of the accused which an accused can prove without difficulty or inconvenience ... Before s 108 comes into operation, it must be shown that the facts are 'especially within the knowledge of any person'. This may already be clear from the evidence before the court ... If the issue of knowledge of the facts is in dispute, then ... the plaintiff must establish prima facie that the facts were especially within the knowledge of the defendant ...' (para (12.031), (12.033), (12.037) *Evidence and the Litigation Process,* (4th Ed) by Jeffrey Pinsler SC) (see also p 3183, Vol 3, *Woodroffe & Amir Ali Law of Evidence* (19th Ed)).

**[20]** A reverse onus clause, where an enactment provides that a particular fact is presumed or deemed to exist 'unless the contrary is proved', as in the Malaysian Anti-Corruption Commission Act 2009, Customs Act 1967, Police Act 1967, Arms Act 1960, and Dangerous Drugs Act 1952, to name just a few, is also an exception to the general rule that an accused bears no onus of proof.

**[21]** The oft given justification for interference with the onus of proof is necessity and the legitimate aim of the legislation in the public interest. Except that interference with the onus of proof could run foul of the presumption of innocence. Yet at the same time, there is the interest of the community at large to be protected. Three decisions of the House of Lords, namely *R v Lambert* [2001] UKHL 37, *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884 and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237, provide much valuable guide to resolve that dilemma.

**[22]** In *R v Lambert*, the appellant was convicted of possession of a controlled drug, with intent to supply, contrary to s 5 of the Misuse of Drugs Act 1971. 'He relied on s 28(3)(b)(i) of that Act asserting that he did not believe or suspect, or have reason to suspect that the bag which he carried contained a controlled drug and in particular cocaine. The judge directed the jury, in accordance with what was accepted to be the law at the time, that the prosecution had to prove only that he had and knew that he had the bag in his

possession and that the bag contained a controlled drug. To establish the defence under s 28(3) he had to prove on the balance of probabilities that he did not know that the bag contained a controlled drug. This was thus the legal rather than the merely evidential burden' (*R v Lambert* at para 1). The Court of Appeal held that a defendant did not have to know that he was in possession of controlled drugs or the precise controlled drug which was the subject of the offence. The appeal was dismissed. 'The Court (of Appeal) however certified three questions. The first in substance is whether it is an essential element of the offence of possession of a controlled drug under s 5 of the 1971 Act that the accused knew that he had a controlled drug in his possession; secondly whether in a charge contrary to s 5 the judge was right to direct the jury that the onus of proving the defence under s 28(2) imposed a legal rather than an evidential of burden of proof that the accused neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. The third question asked whether the accused could, on an appeal after the Human Rights Act 1998 came into force, rely on an alleged breach of Convention rights by the investigating or prosecuting authority at a trial which took place before the Human Rights Act 1998 came into force' (*R v Lambert* at para 3). Five opinions were delivered by the House. All dismissed the appeal.

**[23]** Lord Slynn dismissed the appeal 'on the ground that the appellant cannot rely on Convention rights in a national court in respect of a conviction before the 1998 Act came into force', although His Lordship had no doubt 'that it is possible, without doing violence to the language or to the objective of that section, to read the words as imposing only the evidential burden of proof'.

**[24]** Lord Steyn however held that the House had jurisdiction to hear the substantive issue, namely, whether a reverse burden provision in s 28(2) and (3) of the Misuse of Drugs Act 1971 is compatible with the presumption of innocence contained in article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. And Lord Steyn thus enunciated on the presumption of innocence, statutory presumptions, and the need to strike a balance between public interest and constitutional protections:

> [32] The approach of the common law to the presumption of innocence was memorably stated by Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1 at p 8; [1935] AC 462 at p 481 to be that 'Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'. The *Woolmington* principle was, however, subject to Parliament legislating to the contrary. It is a fact that the Legislature has frequently and in an arbitrary and indiscriminate manner made inroads on the basic presumption of innocence ... In 1972 a most distinguished Criminal Law Revision Committee had observed that 'we are strongly of the opinion that, both on principle and for the sake of clarity and

convenience in practice, burdens on the defence should be evidential only': *Eleventh Report of the Criminal Law Revision Committee: Evidence (General)* (Cmnd 4991 (1972)), para 140. Nevertheless, the process of enacting legal reverse burden of proof provisions continued apace.

[33] In the meantime the human rights movement came into existence. The foundation of it was the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226), which has been the starting point of subsequent human rights texts. In art 11(1) it provided: 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law' ... Nevertheless, and despite the right of petition to the European Court of Human Rights created for the United Kingdom in 1961, there was no constraint in our domestic law to legislative incursions on the presumption of innocence. But by the 1998 Act Parliament has provided that, subject to the ultimate constitutional principle of the sovereignty of Parliament, inroads on the presumption of innocence must be compatible with art 6(2) as properly construed. If incompatibility arises, the subtle mechanisms of the 1998 Act come into play.

[34] In *McIntosh v Lord Advocate* [2001] UKPC D1; [2001] 2 All ER 638; [2001] 3 WLR 107 Lord Bingham of Cornhill recently referred to the judgment of Sachs J of the South African Constitutional Court in *State v Coetzee* [1997] 2 LRC 593. It is worth setting out the eloquent explanation by Sachs J (at pp 677–678 (para 220)) of the significance of the presumption of innocence in full:

> There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book ... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.

The logic of this reasoning is inescapable. It is nevertheless right to say that in a constitutional democracy limited inroads on the presumption of innocence may be justified. The approach to be adopted was stated by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 at p 388 (para 28) as follows:

> Presumptions of fact or of law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however,

A require the Contracting States to remain within certain limits in this respect as regards criminal law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

B This test depends upon the circumstances of the individual case. It follows that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed.

C

**[25]** In the following paragraph, Lord Steyn adopted the following reasoning of Dickson CJC in *R v Whyte* (1988) 51 DLR (4th) 481, where the Canadian Supreme Court rejected an argument that as a matter of principle a constitutional presumption of innocence only applies to elements of the D offence and not excuses:

In *R v Whyte* (1988) 51 DLR (4th) 481 the Canadian Supreme Court rejected an argument that as a matter of principle a constitutional presumption of innocence only applies to elements of the offence and not excuses. Giving the judgment of the court Dickson CJC observed at p 493:

E

> The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of F innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

G I would adopt this reasoning ...

**[26]** Lord Steyn then thus enunciated on the principle of proportionality:

> 37. That is, however, not the end of the matter. The burden is on the state to show H that the legislative means adopted were not greater than necessary. Where there is objective justification for some inroad on the presumption of innocence the legislature has a choice. The first is to impose a legal burden of proof on the accused. If such a burden is created the matter in question must be taken as proved against the accused unless he satisfies the jury on a balance of probabilities to the contrary: *The Eleventh Report of the Cr LRC,* para 138. The second is to impose an evidential I burden only on the accused. If this technique is adopted the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the prosecution have the burden of satisfying the jury as to the matter beyond reasonable doubt in the ordinary way: *The Eleventh Report of the Cr LRC,* para 138. It is important to bear in mind that it

is not enough for the defence merely to allege the fact in question: the court decides whether there is a real issue on the matter: *The Eleventh Report of the Cr LRC,* para 138. A transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden of the accused. The former requires the accused to establish his innocence. It necessarily involves the risk that, if the jury are faithful to the judge's direction, they may convict where the accused has not discharged the legal burden resting on him but left them unsure on the point. This risk is not present if only an evidential burden is created.

38. The principle of proportionality requires the House to consider whether there was a pressing necessity to impose a legal rather than evidential burden on the accused ...

**[27]** Lord Hope in *R v Lambert* also did not think that a modification or limitation of the presumption of innocence will inevitably give rise to a finding of incompatibility:

[88] Mr Owen said that the court was not concerned in the *Salabiaku* case with a provision applicable to a person charged with a serious criminal offence which placed the burden of proof on him with respect to an essential element of it. That is true, but I do not think that this deprives it of value as a statement of principle. What it means is that, as the art 6(2) right is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality: *Ashingdane v United Kingdom* (1985) 7 EHRR 528; see also *Brown v Stott* [2001] 2 All ER 97; [2001] 2 WLR 817. It is now well settled that the principle which is to be applied requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.

**[28]** Lord Clyde said that 'the imposition of a burden on the defendant does not necessarily involve a contravention of the Convention' that the words 'according to law' in article 6(2) do not merely refer to domestic law, but also to the rule of law, and accordingly certain limits must be observed in the extent to which presumptions of fact or law are acceptable, and that 'those limits must be reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.

**[29]** Lord Hutton held that the 1998 Act did not have a retrospective effect in the case. But His Lordship nonetheless addressed the substantive issue and said, also, that 'Whether or not there has been a violation of article 6(2) depends, therefore, upon whether the presumption created by s 28(2) and (3) is confined within reasonable limits which take into account the importance of what is at stake and maintains the rights of the defence' (*R v Lambert* at para 186). Lord Hutton then identified two factors to be considered, in

considering whether the rebuttable presumption of knowledge created by s 28(2) and (3) is compatible with article 6(2):

(1) Is the presumption created by subsections 28(2) and (3) directed towards a clear and proper public objective?

In my opinion it clearly is. The taking of controlled drugs is a great social evil which causes widespread suffering and the possession of controlled drugs with intent to supply is a grave and frequently committed offence which ensures the continuation of this social evil.

(2) Is the creation of the presumption a reasonable measure for Parliament to take and is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?

**[30]** Lord Hutton held that the accused had a persuasive burden, that the transfer of onus of proof of knowledge in drug cases did not violate article 6(2) and satisfied the test of a legitimate aim in the public interest, and that there was proportionality between the means employed and the aim sought to be realised.

197. My Lords, when judges of such eminence considered that transferring the burden of proof in relation to knowledge would not result in an unfair trial to the defendant, I consider that thirty years later when the problem has not changed there is no reason for this House to take a different view. Section 2 of the 1998 Act now requires the House in determining a question which has arisen in connection with a Convention right to take into account judgments of the European Court and decisions of the European Commission, but in my opinion the judgments and decisions to which I have referred provide no basis for the view that under the jurisprudence of the European Court the transfer of the onus of proof as to knowledge in drugs cases would constitute a violation of article 6(2).

198. Therefore my conclusion is that the difficulty in some cases of convicting those guilty of the crime of possession of a controlled drug with intent to supply, if the burden of proving knowledge beyond a reasonable doubt rests on the prosecution, is not resolved by placing an evidential burden on the defendant, and that it is necessary to impose a persuasive burden as subsections 28(2) and (3) do. I further consider that the transfer of the onus satisfies the test that it has a legitimate aim in the public interest and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Accordingly I am of the opinion that subsections 28(2) and (3) do not violate art 6(2) and I am in full agreement with the Court of Appeal on this issue.

**[31]** Incidentally, in *R v Director of Public Prosecutions ex parte Kebilene* [1999] 3 WLR 972 at p 997, Lord Hope had expressed a similar view that there is no prohibition against reverse onus clauses, be it as to fact or law:

The cases show that, although art 6(2) is in absolute terms, it is not regarded as imposing an absolute prohibition on reverse onus clauses, whether they be evidential (presumptions of fact) or persuasive (presumptions of law). In each case

the question will be whether the presumption is within reasonable limits. A

(the above passage was cited with approval by the Privy Council in *Brown v Stott (Procurator Fiscal, Dunfermline) and another* [2001] 2 All ER 97).

**[32]** In *R v Carass* [2001] EWCA Crim 2845, the Court of Appeal Criminal Division thus summarised the position: B

> 60. Furthermore, what we would glean from Lambert is that albeit it may be possible to justify imposing a legal or persuasive burden, the onus on those seeking to persuade the court that that is necessary in any case is a high one. Lord Steyn says that expressly and we believe that view to be consistent with all of the other speeches including Lord Hutton's dissenting speech. Thus the proper approach has to be that if a reverse legal burden is to be imposed on an accused it must be justified and in particular it must be demonstrated why a legal or persuasive burden rather than an evidential burden is necessary. If one poses the third question on those suggested as appropriate by Lord Hope in *Kebilene* at p 386C quoted above 'what is the nature of the threat faced by society which the provision is designed to combat?' — the nearest one gets to an attempt to meet that question is we believe in Mr Eadie's skeleton argument at para 22 where he says: C D
>
> > There is obvious sense in, and justification for, this approach. It operates to make it for the defendant to prove matters which the prosecution would be highly unlikely to be able to know about and which it might be difficult, if not impossible, for them to rebut. E

**[33]** In *Sheldrake v Director of Public Prosecutions* [2003] EWHC 273 (Admin), an appeal by way of case stated by the appellant, Peter Sheldrake, against his conviction by justices in North East Essex, for driving a motor vehicle after consuming so much alcohol that the proportion of alcohol in his breath exceeded the prescribed limit, contrary to s 5(1)(b) of the Road Traffic Act 1988, before a three-judge court, where the essential question for decision was whether, having regard to article 6(2) of the European Convention for the Protection of Human rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998) and s 3(1) of the 1998 Act, the reverse onus of proof provision in s 5(2) of the 1988 Act imposes a legal or evidential burden on an accused charged with an offence contrary to s 5(1)(b), Clarke LJ (Jack J in agreement) also held that if a reverse burden is to be imposed on an accused, it must be demonstrated why a persuasive rather than an evidentiary burden is necessary, and that the test of one of necessity: F G H

> The Court of Appeal [in Carass] applied that test of necessity to an offence of concealing of debts of a company in anticipation of a winding up contrary to s 206(1)(a) of the Insolvency Act 1986 and to the reverse onus provision in s 206(4). This provides that 'it is a defence — (a) for a person charged under para (a) or (f) of subsection (1) ... to prove that he had no intent to defraud'. Subsection (4) would have been construed as imposing a legal burden of proof but was read down so as to impose an evidential burden of proof because the test of necessity was not satisfied. I

A [45] There have been a number of cases since Carass, but I do not read any of them as contradicting the conclusion that the test is one of necessity: see eg *R v Daniel* [2002] EWCA Crim 959, 22 March 2002, per Auld LJ, giving the judgment of the court at para 24. The question is therefore whether it is necessary to construe s 5(2) as imposing a legal burden of proof and not an evidential burden.

B

**[34]** The said s 5(1)(b) of the Road Traffic Act 1988, so far as material, provides:

> (1) If a person ... (b) is in charge of a motor vehicle on a road or other public
C place, after consuming so much alcohol that the proportion in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.
>
> (2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the
D vehicle whilst the proportion of alcohol in his breath, blood, or urine remained likely to exceed the prescribed limit.

**[35]** By a majority, it held that to construe the provision as imposing a legal burden on the defendant would be disproportionate and would amount to a
E breach of article 6(2), but that the provision could be read down in the same way as envisaged in *R v Lambert* so as to impose an evidential burden only.

**[36]** The appeal by the Director of Public Prosecutions, with leave of the House of Lords Appeal Committee from the decision of the Divisional Court
F in *Sheldrake v Director of Public Prosecutions* [2003] EWHC 273 was heard together with a reference by the Attorney General which was prompted by the acquittal of A, who was indicted under s 11(1) of the Terrorism Act 2000, which provided:

G
> (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.
>
> (2) It is a defence for a person charged with an offence under subsection (1) to prove — (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a
H member, and (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.

**[37]** It was common ground that s 11(2) imposed on the defendant an evidential burden only. But despite this, the trial judge ruled that there was no
I case to answer on these counts. The questions referred by the Attorney General for the opinion of the Court of Appeal were (1) what are the ingredients of an offence contrary to s 11(1) of the Terrorism Act 2000?; and (2) does the defence contained in s 11(2) of the 2000 Act impose a legal, rather than an evidential, burden of proof on an accused, and if so, is such a legal burden compatible with

the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998) and, in particular, articles 6(2) and 10 of the convention? The Court of Appeal (Latham LJ, Hunt and Hedley JJ) gave its opinion (*Attorney General's Reference (No 4 of 2002)* [2003] EWCA Crim 762; [2004] 1 All ER 1) and referred the same said questions to the House of Lords.

**[38]** Lord Bingham (Lord Steyn and Lord Phillips in agreement) allowed the Director's appeal, reinstated the justices' decision and answered the question by saying that the burden of proof provision in s 5(2) of the 1988 Act imposed a legal burden on an accused who is charged with an offence contrary to s 5(1)(b) of that Act (see *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237 at para 44). Lord Bingham held that s 11 of the Terrorism Act 2000 was proportionate.

**[39]** In arriving at that decision, Lord Bingham first reviewed the pre-convention law of England and Wales:

> [3] The pre-convention law of England and Wales
>
> The governing principle of English criminal law, memorably affirmed by *Viscount Sankey LC in Woolmington v DPP* [1935] AC 462 at p 481; [1935] All ER Rep 1 at p 8, is that the onus lies upon the prosecution in a criminal trial to prove all the elements of the offence with which the accused is charged. This principle has been regarded as supremely important, but not as absolute. Viscount Sankey LC ([1935] AC 462 at p 475; [1935] All ER Rep 1 at p 4) ... further acknowledged ([1935] AC 462 at p 481; [1935] All ER Rep 1 at p 8) that his statement of principle was 'subject also to any statutory exception.
>
> [4] One form of statutory exception arose where a defendant sought to rely, in answer to a criminal charge on indictment, on any statutory exception, exemption, proviso, excuse or qualification. It was clearly established that the burden of proving such ground of exoneration, on a balance of probabilities, lay on him: *R v Edwards* [1974] 2 All ER 1085; [1975] QB 27, *R v Hunt* [1987] 1 All ER 1; [1987] AC 352 ... Thus, on a charge of selling intoxicating liquor without a justices' licence, it is not for the prosecutor to prove that the defendant had no licence but for the defendant to prove that he had: *R v Edwards*, *R v Hunt*.
>
> [5] It is not only in cases such as these, and cases of insanity, that a burden may be placed upon the defendant to prove (on a balance of probabilities) a special statutory defence. Thus in *Mancini v DPP* [1941] 3 All ER 272 at p 279; [1942] AC 1 at 11, Viscount Simon LC referred, as an exception to the rule in *Woolmington v DPP*, to 'offences where onus of proof is specially dealt with by statute'. In *Jayasena v R* [1970] 1 All ER 219 at p 221; [1970] AC 618 at p 623, Lord Devlin also recognised 'a statutory defence' as an exception to the *Woolmington* rule, and Lord Templeman in *R v Hunt* [1987] 1 All ER 1 at p 3; [1987] AC 352 at p 364, referred to 'statutory defences which must be proved by the accused'. Far from condemning the placing of a burden on the accused to prove (on the balance of probabilities) a ground of exoneration, judges of high authority have, in cases judged by them to be

appropriate, advocated such a course. Lord Pearce did so in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356 at p 390; [1969] 2 AC 256 at p 307 and again in *Sweet v Parsley* [1969] 1 All ER 347 at p 357; [1970] AC 132 at p 157. In the latter case Lord Reid also said:

> Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities, he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method ... (see [1969] 1 All ER 347 at p 351; [1970] AC 132 at p 150.)

A further example may be given. When, in 1987, it was proposed to criminalise the possession of a bladed or sharply pointed article, other than a small pocket knife, 'without good reason or lawful authority', Lord Denning MR suggested that the burden of proving good reason or lawful authority by way of defence should be expressly placed on the defendant (*Hansard*, 489 HL Official Report (5th series) cols 923–924). The suggestion was accepted (*Hansard*, 490 HL Official Report (5th series) cols 474, 475), and s 139(4) of the Criminal Justice Act 1988, as enacted, provides:

> It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.

In practice, Parliament has been very ready to impose legal burdens on, or provide for presumptions rebuttable by, the defendant: see Ashworth and Blake 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306 at p 309. But the language of the statute may not, in some cases, make it plain whether a ground of exoneration must be established by the defendant or negatived by the prosecutor. In *Nimmo v Alexander Cowan & Sons Ltd* [1967] 3 All ER 187; [1968] AC 107 the House was divided on the question. In such a case, as Lord Griffiths said in *R v Hunt* [1987] 1 All ER 1 at p 11; [1987] AC 352 at p 374:

> ... the court should look to other considerations to determine the intention of Parliament, such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance, for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute.

[6] One further point may conveniently be noted at this stage. In *Sweet v Parsley* [1969] 1 All ER 347 at pp 349–350; [1970] AC 132 at pp 148–149 Lord Reid stated that:

> there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea ... it is firmly established by a host of

> authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.

Thus, in interpreting an offence-creating statutory provision, the starting point for the court is, as Lord Nicholls of Birkenhead put it in *B (a minor) v DPP* [2000] 1 All ER 833 at p 836; [2000] 2 AC 428 at p 460:

> ... the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication.

Effect was given to the presumption in that case, as it was in *R v K* [2001] UKHL 41; [2001] 3 All ER 897; [2002] 1 AC 462. It is a strong presumption, not easily displaced. The more serious the crime, and the more severe the potential consequences of conviction, the less readily will it be displaced. But it is of course the ordinary duty of the courts to give effect to what Parliament has by clear words or necessary implication enacted, and it is not hard to find instances in which Parliament has clearly intended to attach criminal consequences to proof of defined facts, irrespective of an individual's state of mind or moral blameworthiness. Many such instances are found in legislation regulating the conduct of economic and social life: see *Smith and Hogan on Criminal Law* (10th Ed, 2002) Ch 7, 'Crimes of strict liability'. Offences against such regulations are often regarded as not truly criminal, since the penalty inflicted is not dire and little or no stigma attaches to conviction. Not all offences of strict liability, however, fall within this sterile regulatory area. An old instance which may be thought not to do so is found in s 12 of the Licensing Act 1872, which (as amended) remains in force:

> Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding level 1 on the standard scale.
>
> Every person who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine, or who is drunk when in possession of any loaded firearms, may be apprehended, and shall be liable to a penalty not exceeding level 1 on the standard scale or in the discretion of the court to imprisonment for any term not exceeding one month.

[7] Until the coming into force of the 1998 Act, the issue now before the House could scarcely have arisen. The two statutory provisions which it is necessary to consider are not obscure or ambiguous. They afford the defendant (Mr Sheldrake) and the acquitted person a ground of exoneration, but in each case the provision, interpreted in accordance with the canons of construction ordinarily applied in the courts, would (as already noted) be understood to impose on the defendant a legal burden to establish that ground of exoneration on the balance of probabilities. Until October 2000 the courts would have been bound to interpret the provisions conventionally. Even if minded to do so, they could not have struck down or amended the provisions as repugnant to any statutory or common law rule. Domestic law would have required effect to be given to them according to their accepted meaning. Thus the crucial question is whether the convention and the Strasbourg jurisprudence interpreting it have modified in any relevant respect our domestic regime and, if so, to what extent.

**[40]** In the aforesaid paras 2–7 of his said opinion, Lord Bingham spelt out that under common law: (a) an accused, who sought to rely on any statutory exception, exemption, proviso, excuse or qualification in answer to a criminal charge, had the burden to prove the ground of exoneration, on a balance of probabilities; (b) statutory defences were exceptions to the first limb of the *Woolmington* rule; (c) the placing of a burden on the accused to prove (on the balance of probabilities) a ground of exoneration, was not inappropriate; (d) the common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient, could be expressly and or impliedly displaced by Parliament; (e) the ordinary duty of the courts was to give effect to what Parliament had by clear words or necessary implication enacted; and (f) courts were bound to interpret the provisions conventionally, and s 5(2) of the 1988 Act and s 11(2) of the 2000 Act, which were not obscure or ambiguous, could not have struck down or amended as repugnant to any statutory or common law rule.

**[41]** On the question as to whether the Convention and the *Strasbourg* jurisprudence interpreting it had modified domestic law in any relevant respect, Lord Bingham said that the right to a fair trial and the presumption of innocence had long been recognised in England and Wales and that article 6 of the Convention introduced nothing new to domestic law. Lord Bingham then considered *Salabiaku v France* (1988) 13 EHRR 379, which is the leading *Strasbourg* authority on the presumption of innocence, and said:

> The European Court of Human Rights' decision in *Salabiaku v France* is important less perhaps for what it decided than for the indications it gives of the correct approach in principle. First of all, it is recognised that member states may, generally speaking, attach criminal consequences to defined facts at p 387:
>
> > 27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.
>
> It also sanctions, but in a qualified way, the application of factual and legal presumptions at p 388:
>
> > 28. ... Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, para 2 of art 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be

> free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of art 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The court proposes to consider whether such limits were exceeded to the detriment of Mr Salabiaku.
>
> Thus the question in any case must be whether, on the facts, the reasonable limits to which a presumption must be subject have been exceeded.

**[42]** In the following paragraphs, Lord Hope then reviewed *Hoang v France* (1993) 16 EHRR 53, *H v UK* App No 15023/89 (4 April 1990, unreported), *AG v Malta* App No 16641/90 (10 December 1991, unreported), *Brown v UK* (2002) 35 EHRR CD 197, *Bates v UK* [1996] EHRR 312, *Heaney v Ireland* (2001) 33 EHRR 264, *Telfner v Austria* (2002) 34 EHRR 207, *Porras v Netherlands* App No 49226/99 (18 January 2000, unreported), *Selvanayagam v United Kingdom* App No 57981/00 (12 December 2002, unreported), and *Janosevic v Sweden* (2004) 38 EHRR 473, and held that the following principles could be derived from those cases:

> 21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.

**[43]** Lord Hope then thus summarised and commented on the leading UK cases since the Human Rights Act 1998:

> In *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801; [2000] 2 AC 326 the applicants challenged the compatibility of s 16A of the Prevention of

Terrorism (Temporary Provisions) Act 1989 with art 6(2) of the convention. The relevant provisions read: '(1) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with ... acts of terrorism ... (3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose ...' The Divisional Court concluded that the section did violate art 6(2) since if the defendant failed to discharge the legal burden placed upon him by sub-s (3) he could be convicted of a crime punishable by ten years' imprisonment on grounds of reasonable suspicion, and even if there were a reasonable doubt whether he did possess the articles for purposes of terrorism. The House did not find it necessary to resolve this question. Lord Steyn, in an opinion with which Lord Slynn of Hadley and Lord Cooke of Thorndon agreed, pointed out that s 16A might be upheld if it were read as imposing an evidential and not a legal burden on the defendant. Lord Cooke saw great force in the view that on the natural and ordinary interpretation of the provision there was repugnancy, but also pointed to the possibility of reading down sub-s (3). Lord Hope of Craighead considered that the compatibility of the provision was still open to argument. Lord Hobhouse of Woodborough considered that there might be a justification for the terms in which the legislation was drafted even though on its face it appeared to be contrary to the convention. Parliament paid attention to these observations: when s 16A was re-enacted as s 57 of the Terrorism Act 2000 it was provided (with reference to the defence now in sub-s (2) and some other subsections) in s 118(2): 'If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not'.

The decision of the Privy Council in *Brown v Stott (Procurator Fiscal, Dunfermline)* does not call for detailed examination. It concerned the implied convention right not to incriminate oneself, which the European Court described in *Saunders v UK* (1997) 2 BHRC 358 at pp 373–374 (para 68), as 'closely linked to the presumption of innocence contained in art 6(2) of the convention'. For present purposes the decision is noteworthy for its reiteration of important but uncontroversial principles: that a defendant has a right to a trial which, viewed overall is fair; that the constituent rights listed or implied in art 6, although important, are not absolute; that substantial respect should be paid by the courts to the considered decisions of democratic assemblies and governments; that the convention requires a fair balance to be struck between the rights of the individual and the wider interests of the community; and that the justifiability of a legislative measure must be judged with close regard to the particular social problem or mischief which the measure has been enacted to address.

In *R v A* [2001] UKHL 25; [2001] 3 All ER 1; [2002] 1 AC 45, the challenge was to a recent statutory provision which, it was held, strictly interpreted, could have the effect of excluding relevant evidence and thus of compromising a defendant's right to a fair trial ... Much of the argument was devoted to the scope and application of the interpretative obligation imposed on the courts by s 3 of the 1998 Act ... This opinion (of Lord Steyn) must now be read in the light of the later decision of the House in *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 3 All ER 411; [2004] 3 WLR 113.

The appellant in *R v Lambert* [2001] UKHL 37; [2001] 3 All ER 577; [2002] 2 AC 545, was convicted of possessing a class A controlled drug (cocaine) with intent to supply contrary to s 5 of the Misuse of Drugs Act 1971 ... He was convicted, and on appeal contended that knowledge of the contents of a container was an ingredient of the offence which the prosecution had to prove and that imposition of a legal burden on a defendant to prove lack of knowledge violated the presumption of innocence. The Criminal Division of the Court of Appeal rejected these arguments ([2001] 1 All ER 1014; [2002] QB 1112), but gave its ruling as if the 1998 Act had been in force at the time of the trial. In the House, a majority held that the Act did not operate retrospectively, and the appeal failed on that ground ... A majority of the committee held that knowledge of the contents of the duffle bag was not an ingredient of the offence ... A majority also held that imposition of a legal burden on a defendant to prove lack of knowledge undermined the presumption of innocence to an impermissible extent; that s 28(2) could be read down under s 3 of the 1998 Act so as to impose only an evidential burden; and that it should be read down in that way ...

The opinions of the majority on this second point are, inevitably, of some complexity. They must be read with reference to the particular case with which the House was dealing. The importance of the presumption of innocence was recognised ... It was emphasised that attention should be paid to the substance, not the form, of an enactment, and to the particular facts. In considering justifiability, the need for a balance between the interests of the individual and those of society was recognised. Where some infringement of the presumption of innocence is justified, it should not be greater than necessary to achieve its legitimate object. Decisive in the majority's conclusion on the facts of the case was recognition that, on a charge carrying a maximum of life imprisonment and in circumstances where Parliament, by enacting s 28(2), had recognised the importance of knowledge, a defendant could be convicted even though the jury thought it as likely as not that he was ignorant of the contents of a container in his possession. Such an outcome was plainly regarded as seriously unfair, since a conviction might rest on conduct which was not in any way blameworthy.

The defendant in *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884; [2003] 1 WLR 1736, was convicted of possessing some 500 bootleg recordings in breach of s 92(1)(c) of the Trade Marks Act 1994. Subsection (1) of that section provides ... The section goes on to provide in sub-s (5): 'It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark'.

The defendant's appeal was allowed by the Court of Appeal on other grounds (*R v Johnstone and others* [2002] All ER (D) 34; [2002] EWCA Crim 194 (Feb)) with which the House in large measure agreed. The Court of Appeal however read sub-s (5) as imposing no more than an evidential burden on the defendant, and on this point (not determinative of the appeal) the House disagreed. In his leading opinion, with which the other members of the committee agreed, Lord Nicholls of Birkenhead (*R v Johnstone* [2003] 3 All ER 884 at para 46) interpreted s 92(5) as imposing, on a conventional interpretation, a legal burden on the defendant. As such he accepted at para 47 that it prima facie derogated from the presumption of

innocence. Therefore at para 48, taking account of *Salabiaku v France* (1988) 13 EHRR 379 and the balance to be struck between the public interest and the interests of the individual, it was for the state to justify the derogation and to show that the balance struck was reasonable. Identifying the requirements of a reasonable balance was not, he accepted, easy:

> ... all that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence', (see [2003] 3 All ER 884 at para 49).

He continued:

> 'The relevant factors to be take into account when considering whether such a reason exists have been considered in several recent authorities, in particular the decisions of the House in *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326 and *R v Lambert* [2001] UKHL 37; [2001] 3 All ER 577. And there is now a lengthening list of decisions of the Court of Appeal and other courts in respect of particular statutory provisions. A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused (see Dickson CJC in *R v Whyte* (1988) 51 DLR (4th) 481 at p 493). This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.
>
> In evaluating these factors the court's role is one of review. Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence. I echo the words of Lord Woolf in *A-G of Hong Kong v Lee Kwong-kut*, *A-G of Hong Kong v Lo Chak-man* [1993] 3 All ER 939 at p 955; [1993] AC 951 at p 975: 'In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime'. The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty'.

He concluded at para 53 that there were compelling reasons why s 92(5) should place a legal burden on the defendant. These reasons included at para 52 the urgent international pressure, in the interest of consumers and traders alike, to restrain fraudulent trading in counterfeit goods, the framing of offences against s 92 as

offences of 'near absolute liability' and the dependence of the sub-s (5) defence on facts within the defendant's own knowledge. The considerations at para 52–53 which particularly weighed with him as compelling reasons were however that:

> Those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and keep records and of the risks they take if they do not.

And that —

> it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place.

Thus Lord Nicholls substantially agreed at para 54 with the Court of Appeal decision in *R v S* [2003] 1 Cr App R 602, which made it unnecessary to consider the courts' interpretative obligation under s 3 of the 1998 Act, about which he (at [46]) had earlier voiced some reservations.

**[44]** In relation to the perceived 'difference of emphasis' between the approach of Lord Steyn in *R v Lambert* and the approach of Lord Nicholls in *R v Johnstone*, Lord Bingham held that *R v Johnstone* had not departed from *R v Lambert* 'which should not be treated as superseded or implicitly overruled' and that 'The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence'.

> I intend no disrespect to the Court of Appeal by failing to discuss a number of cases in which that court has considered, in relation to various statutes, the presumption of innocence. But I cannot overlook the decision of an enlarged Court of Appeal (Lord Woolf CJ, Judge LJ, Gage, Elias and Stanley Burnton JJ) in *A-G's Ref (No 1 of 2004)* [2004] EWCA Crim 1025, [2004] 1 WLR 2111 and four appeals heard at the same time. In its judgment at para 38 the court considered much of the authority to which I have referred (although not *Ghaidan v Mendoza*, which had not been decided) and detected a 'significant difference in emphasis' between the approach of Lord Steyn in *R v Lambert* [2001] 3 All ER 577 and that of Lord Nicholls in *R v Johnstone* [2003] 3 All ER 884. Making plain its preference for the latter, the court prefaced its guidance to the courts of England and Wales by ruling ( [2004] 1 WLR 2111 at para 52(a)):
>
> > Courts should strongly discourage the citation of authority to them other than the decision of the House of Lords in Johnstone ... and this guidance. Johnstone is at present the latest word on the subject.

Relying on this judgment, Mr Perry, for the Director of Public Prosecutions and the Attorney General, submitted in his printed case and (more tentatively) in argument that there was clearly a difference of emphasis between the approach of Lord Steyn in *R v Lambert* and that of Lord Nicholls in *R v Johnstone*, and that the latter was to be preferred. Mr Turner QC, for Mr Sheldrake, made a submission to the opposite

effect, that the reasoning of the House in *R v Johnstone* should not be followed.

> Both *R v Lambert* and *R v Johnstone* are recent decisions of the House, binding on all lower courts for what they decide. Nothing said in *R v Johnstone* suggests an intention to depart from or modify the earlier decision, which should not be treated as superseded or implicitly overruled. Differences of emphasis (and Lord Steyn was not a lone voice in *R v Lambert*) are explicable by the difference in the subject matter of the two cases ...
>
> The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It may none the less be questioned whether (as the Court of Appeal ruled in *A-G's Ref (No 1 of 2004)* [2004] 1 WLR 2111 at para 52(d) 'The assumption should be that Parliament would not have made an exception without good reason'. Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by s 3 of the 1998 Act.

**[45]** Lord Hope then held that *R v Carass* was wrongly decided:

> The House was not addressed on the cases decided in A-G's Ref (No 1 of 2004). In the absence of argument, I would incline to agree with the Court of Appeal's conclusion in each case and would in particular agree that *R v Carass* [2001] EWCA Crim 2845, [2002] 1 WLR 1714 was wrongly decided. I would not endorse the guidance given by the Court of Appeal in [52] of its judgment save to the extent, that it is in accordance with the opinions of the House in these cases which must, unless and until revised or supplemented, be regarded as the primary domestic authority on reverse burdens.

**[46]** The following statements/guidelines/principles, those pertinent to the instant reference, could be distilled from *R v Lambert*, *R v Johnstone* and *Sheldrake v Director of Public Prosecutions* (HL) and the cases there cited:

(a) presumptions of fact or of law operate in every legal system;

(b) it is open to states to define the constituent elements of an offence, even to exclude the requirement of mens rea;

(c) when a section is silent as to mens rea, there is a presumption that mens rea is an essential ingredient: The more serious the crime, the less readily will that presumption be displaced;

(d) the overriding concern is that a trial should be fair: The presumption of innocence is a fundamental right directed to that end;

(e) there is no prohibition against presumptions in principle, but the principle of proportionality must be observed. A balance must be struck between the general interest of the community and the protection of

fundamental rights. The substance and effect of presumptions adverse to an accused must not be greater than is necessary and must be reasonable;

(f) the test to be applied is whether the modification or limitation pursues a legitimate aim and whether it satisfies the principle of proportionality;

(g) reasonable limits take into account the importance of what is at stake and maintain the rights of the defence;

(h) the mischief at which the Act is aimed and the ease or difficulty that the respective parties would encounter in discharging the burden are important factors;

(i) it is justified to make it for the accused to prove matters which the prosecution would be highly unlikely to be able to know and which it might be difficult, if not impossible for them to rebut;

(j) relevant to reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption;

(k) the test depends upon the circumstances of the individual case. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case;

(l) the task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence; and

(m) security concerns do not absolve member states from their duty to observe basic standards of fairness.

**[47]** Counsel for the respondent relied on *State v Coetzee* to support the case that s 122(1) was unconstitutional. In *State v Coetzee*, even a limited inroad on the presumption of innocence was not accepted. But that unyielding stand was clearly disapproved in *R v Lambert*, where Lord Steyn said at para 34 that 'limited inroads on the presumption of innocence may be justified'. Just that 'inroads require justification and must not be greater than necessary. In addition the principle of proportionality must be observed' (*Attorney General's Reference (No 1 of 2004); R v Edwards and other appeals* [2005] 4 All ER 457; [2004] 2 Cr App Rep 424 (CA) per Lord Woolf CJ). Besides, the impugned provision in *State v Coetzee* was very different from s 122(1), which is further reason not to follow that decision. Significantly, the pre-Convention law of England and Wales did not prohibit presumptions or reverse onus clauses. Neither article 6 of the Convention nor international jurisprudence forbids the

same. Hence, it would not be that art 5 of the Federal Constitution that was founded on the Westminster model could proscribe otherwise. It could only be that presumptions and reverse onus clauses are not prohibited by art 5 of the Federal Constitution. As such, it was futile to contend that s 122(1) was unconstitutional because of the presumption and reverse onus clause. Section 122(1) would be unconstitutional only if it lacked overall fairness. But no attempt was made by either party to show how s 122(1) had or had not gone beyond the permissible limits and or had or had not unjustifiably infringed the presumption of innocence. Since it was not shown to be otherwise, the presumption in favour of constitutionality could not have been rebutted. But such a ruling would leave the 'constitutional issues' without resolution. A s 84 reference should be answered by the constitutional court. There should be a ruling on the constitutionality or otherwise of the presumption and reverse onus clause in the said s 122(1) in particular and of comparable presumptions and reverse onus clauses in general. That would first require a consideration of the aim of the SIA.

**[48]** The long title and preamble of the SIA proclaimed that the SIA is 'An Act to make provisions with respect to stock exchanges and other persons dealing in securities, and for certain offences relating to trading in securities, and for purposes connected therewith'. And just as proclaimed, Parts III–VII of the SIA provided the law that governed the establishment and operation of stock exchanges and clearing houses and the licensing of persons dealing in securities, while Parts IX–X of the SIA created offences relating to false trading, market rigging transactions, stock market manipulations, false or misleading statements to influence the market, and, manipulative and deceptive devices to fraudulently induce persons to deal in securities. The evident aim of the SIA was to regulate the industry, to promote public confidence in the integrity of the stock market, and to punish violators with criminal and civil liability. Section 88B of the SIA provided that 'A person who contravenes or fails to comply with sections 84, 85, 86, 87, 87A or 88 commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years'. Conviction was punishable with fine and imprisonment, not fine or imprisonment. But only individuals could be locked up. A corporate could not be locked up. If individual directors and or officers were not indicted, the punishment of fine and imprisonment could not be imposed. But was it reasonable that individual directors and or officers be held accountable for the crimes and or negative behavior of the corporate? After all, a corporate has a separate legal personality from its directors and officers. But a corporate is a legal fiction. In reality, all activities of a corporate are managed by its directors and or officers. Crimes and offences of a corporate could not come about without the acts and or defaults of its directors and or officers. In the case of offences against the SIA, the actual violators would be the directors and or officers who would not be deterred by fines imposed on a corporate. Moreover, a fine imposed on a corporate would only penalise innocent investors. Actual

violators must be deterred to promote public confidence in the integrity of the stock market. And actual violators would not be deterred if they had no personal liability. As such, it only made good sense that s 122(1) provided that directors and or officers shall be deemed to have committed the offences committed by the corporate 'unless ...'. To achieve the aim of the SIA, the offence of the corporate must be attributed, only rightly so, to its human operatives, namely to its directors and or officers. That presumption was not only fair but was also absolutely necessary to protect the stock market. There should be no issue about that. The real concern should be whether the presumption and reverse onus clause in s 122(1) made any unreasonable inroad on the presumption of innocence.

**[49]** The presumption of innocence requires the prosecution to prove the guilt of an accused beyond all reasonable doubt. Section 122(1) provided that 'Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless ...'. The offence against the Act or regulation must be proved to have been committed by the corporate before it could be deemed that the offence was committed by its directors and or its officers. In short, the corporate offence must be first proved before the presumption could be triggered against the directors and or officers. Yes, s 122(1) provided that directors and or officers of the corporate shall be deemed to have committed the corporate offence. But there was no let-up in the burden or standard of proof. It remained that the prosecution had to prove the offence beyond all reasonable doubt before the deeming provision could be triggered. There was no displacement of the presumption of innocence as contended.

**[50]** As said, the deeming provision was fair and necessary. There was no merit in the argument that s 122(1) deemed B guilty of an offence committed by A. Guilt was never deemed or presumed. Section 122(1) only deemed that B committed the offence committed by A, because only B could have caused or motivated the offence committed by A 'unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances'. It was contended that the 'unless proviso' placed the onus on B to prove the excusing factors to avoid punishment. But that could not be further from the truth. For rather than 'placed the onus on B to prove the excusing factors to avoid punishment', the section gave opportunity to B to rebut the deeming provision, by providing a statutory defence. And in relation to the matters stated in the statutory defence, namely the absence of knowledge, consent or connivance of the directors or officers, they were

matters clearly within the sole knowledge of the directors and or officers. It should not be difficult for B to prove the absence of his knowledge, consent or connivance. On the other hand, it could not be easy for the prosecution to prove that the offence was committed by the corporate with the knowledge, consent or connivance of particular directors and or particular officers. It was only fair that the matter of absence of knowledge, consent or connivance should be proved by the accused. In any event, it was a statutory defence, and no prosecution has the onus to prove a defence, statutory or otherwise.

**[51]** The 'third thing' that s 122(1) was said to have done was that it adjudicated on the guilt of B, and in that sense, because it was adjudicatory and not evidential, it was contended that it breached the doctrine of the separation of powers. That contention, with respect, was bereft of merit. For it is plain as a pikestaff that s 122(1) was just an offence creating provision. Adjudication of guilt or innocence was left to the court with freedom to decide. If it were true that s 122(1) adjudicated on guilt, then the respondent would not be tried at the trial court. For if so, then the respondent would have been sentenced, the moment it was proved that the corporate committed the offence. But his defence was called. Section 122(1) gave the opportunity to the respondent to rebut the presumption that he committed the offence committed by the corporate. In point of fact, guilt or innocence has yet to be decided, pending the defence of the respondent. Section 122(1) could not be adjudicatory as contended.

**[52]** There was a presumption and reverse onus clause in s 122(1). But the substance and effect of the presumption was reasonable and was not greater than was necessary. The rights of the defence were maintained. The statutory defence provided the opportunity to an accused to rebut the presumption. It was only right that an accused should prove the matters set out in statutory defence. Fairly said, there was balance between the general interest of the community and the protection of fundamental rights. There is no basis to hold that s 122(1) was unconstitutional.

**[53]** Incidentally, in *AG v Malta* App No 16641/90, the applicant was charged with customs offences of making a statement or furnishing a document or information which to his knowledge was false in a material particular, or recklessly making a statement which was false in a material particular. There were two sets of proceedings. He was convicted by the criminal court of magistrates of having presented two customs declarations signed by him personally which were false and sentenced to a hefty fine. On the same day, the applicant was acquitted of similar charges on the ground, inter alia, that there was no proof that the applicant had signed the entries in question. The prosecutor appealed to the Court of Criminal Appeal which referred the matter to the First Hall of the Civil Court. The applicant argued

that s 13 of the Interpretation Act relied on by the prosecution was contrary to the presumption of innocence guaranteed under the Constitution.
Section 13 provides, inter alia, that:

> Where any offence under or against any provision contained in any Act, whether passed before or after this Act, is committed by a body or other association of persons, be corporate or unincorporate, every person who, at time of the commission of the offence, was a director ... of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence ...

**[54]** The Civil Court found that s 13 only had the effect of placing the burden of proof of certain facts upon the person charged and that this did not conflict with art 40(5) of the Constitution. The applicant appealed to the constitutional court. The constitutional court dismissed the applicant's appeal. It found that s 13 placed the burden of proving certain facts on the person charged but that the presumption created by the provision was rebuttable and not unreasonable, since otherwise it would be impossible in the majority of cases for the prosecution to prove its case against a company. It concluded that s 13 was not in conflict with the Constitution. The case was then remitted to the Court of Criminal Appeal. But the proceedings were suspended pending the application before the Convention organs. The applicant complained that s 13 of the Interpretation Act contravened article 6 para 2 of the Convention in that it deprived him of the presumption of innocence.

**[55]** Section 13 of the Interpretation Act, which was practically identical to s 122(1), read that 'every person who, at time of the commission of the offence, was a director ... of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless ...'. The Maltese provision was far more ominous than s 122(1). Yet it was held by the European Commission of Human Rights that the complaint of the applicant was ill-founded.

> The Commission recalls that presumptions of fact or of law operate in every legal system and that while the Convention does not prohibit such presumptions in principle, art 6 para 2 (Art 6–2) requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see eg Eur Court HR, *Salabiaku* judgment of 7 October 1988, Series A No 141A, pp 15–18, paras 28–30).
>
> The Commission notes that in the present case the legislation provides that a director of a company is presumed guilty of an offence committed by the company unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. The applicant was therefore provided under the legislation with the possibility of exculpating himself. The Commission does not consider that the conditions, which required the

applicant to prove that he had no actual knowledge of the offence and also was not negligent in his duties as an officer of a company, were self-contradictory or imposed an irrebuttable presumption. The Commission further finds that the Maltese courts enjoyed a genuine freedom of assessment in this area and that there is no indication that art 13 of the 1975 Act was applied to the applicant in a manner incompatible with the presumption of innocence.

The Commission considers therefore that the application is manifestly ill-founded within the meaning of art 27 para 2 (Art 27–2) of the Convention.

**[56]** The fourth 'constitutional issue' asked whether the continued prosecution of the alternative charge after acquittal of the principal charge violated art 7(2) of the Federal Constitution which reads 'A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted'. We could intuitively answer that the doctrine of *autrefois acquit* only applies where an accused is charged for the same offence for which he has been acquitted. 'We are of the view that the scope and extent of protection enshrined under art 7(2) of the Federal Constitution only applies to criminal offences wherein a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence' (*Palautah a/l Sinnappayan & Anor v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 295 per Zulkefli FCJ, as he then was, delivering the judgment of the court). 'For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law' (*Connelly v Director of Public Prosecutions* [1964] AC 1254 at pp 1339–1340, per Lord Devlin; Lord Pearce in agreement).

**[57]** The respondent was acquitted by the trial court of an offence under s 86(b) read together with s 122C(c) of the Act, in which he was alleged to have abetted the corporate in its making of a misleading statement in the 'Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31.12.2006' which was 'likely to induce the purchase of securities of Transmile Group Berhad by other persons'. 'Abet' was not defined in the Act. But if s 107 of the Penal Code could be that guide to the meaning of the word, then in relation to the principal charge, the ingredients of the offence under s 86(b) read together with s 122C(c) of the Act were (i) the corporate made a misleading statement in the said quarterly report, (ii) the corporate ought reasonably to have known that the statement was misleading in a material particular, and, (ii) the respondent instigated or commanded the corporate to make the said misleading statement, or engaged with one or more other person

or persons in a conspiracy to cause the corporate to make that misleading statement, or intentionally aided the corporate to make the misleading statement.

**[58]** Under the alternative charge, the respondent was said to have committed the offence committed by the corporate under s 122B(a)(bb) of the Act which read:

> A person who —
>
> (a) with intent to deceive, makes or furnishes; or
>
> (b) knowingly authorises or permits the making or furnishing of,
>
> any false or misleading statement or report to the Commission, a stock exchange or a recognised clearing house relating to —
>
> (aa) dealings in securities;
>
> (bb) the affairs of a listed corporation;
>
> (cc) any matter or thing required by the Commission for the due administration of this Act; or
>
> (dd) the enforcement of the rules of a stock exchange or the rules of a recognised clearing house,
>
> commits an offence and is liable on conviction to a fine not exceeding three million ringgit or to imprisonment for a term not exceeding ten years or to both.

**[59]** And as per the alternative charge, the ingredients of the offence were (i) the corporate, with intent to deceive, furnished a misleading statement to Bursa Malaysia and thereby committed an offence under s 122B(a)(bb) of the Act, and, (ii) the respondent was a director of the corporate and thereby deemed to have committed the offence committed by the corporate.

**[60]** The ingredients of the principal and alternative charge were different in fact and in law. A plea of *autrefois acquit* would not succeed. Unfortunately, that fourth 'constitutional issue' was not recognised by the courts below for what it was. In substance, the fourth 'constitutional issue' was just a plea of *autrefois acquit*. It should not have been accepted by the courts below as a 'constitutional issue' when it was not. The fourth 'constitutional issue' should also not have been referred to this court for determination. There was no evidence, not going by the facts settled by the High Court, of the arbitrary and indiscriminate use of s 122(1). We should not answer a hypothetical issue.

**[61]** We however unanimously answer the rest of the 'constitutional issues' as follows:

A (a) s 122(1) of the SIA 1983 did not violate the doctrine of presumption of innocence;

(b) s 122(1) of the SIA 1983 maintained the burden of proof, in that the prosecution must prove a charge against an accused beyond all reasonable doubt; and

B

(c) s 122(1) of the SIA 1983 upheld the doctrine of separation of powers.

*Section 122(1) of the SIA 1983 was not unconstitutional.*

C Reported by Ashok Kumar

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